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Accessing Insolvent Consumer Debtors, Challenges and Strategies for Empirical Research

Janis Sarra and Danielle Sarra¹

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I. Introduction

Insolvency law policy is best informed by a comprehensive understanding of the policy objectives of particular measures and the practical outcomes of particular choices. Yet there continues to be a lack of empirical research in Canada in respect of consumer insolvency, its underlying causes and its outcomes. Debtors' or bankrupts' experience with the insolvency system is almost impossible to gauge with the data now collected. Research funding for legal, economic and sociological scholars in the insolvency area continues to be very limited. This paper examines current challenges and strategies for empirical research on consumer insolvency in Canada. It explores options for researchers to access insolvent debtors that have utilized the procedures under the *Bankruptcy and Insolvency Act (BIA)*, including how data could be more meaningfully collected and analyzed.²

The paper also explores the serious lacuna in information on debtors that have not accessed the insolvency system, but who may be experiencing severe financial distress. Scholars have observed that such individuals may either not be able to afford bankruptcy, or that they are deferring filing for longer periods before seeking the relief offered by insolvency law. Deferral of filing may unnecessarily exacerbate debtors' financial distress. Absent accurate information, it is difficult to understand how the system could be made more accessible for consumer debtors.

This study was funded by the Canadian Office of the Superintendent of Bankruptcy (OSB). The OSB, which has administrative oversight of the *BIA*, has made recent strides in setting the basis for empirical research in respect of electronic data collection in the past few years. However, the database can be limited in its utility in respect of ascertaining the experience of financially distressed individuals. Declarations on forms filed under the *BIA* are often made without the full benefit of understanding debtors' situations or the disclosures are made using standard form language by the particular trustee in

¹ Dr. Janis Sarra, University of British Columbia Faculty of Law, Vancouver, Canada, and Danielle Sarra, Hons. B.A., Toronto, Canada. Our thanks to Bernard Lau, UBC law student, for research assistance. Our very sincere thank you to the scholars, insolvency and credit counselling professionals that assisted with the study. Financial support from the Office of the Superintendent of Bankruptcy Canada to conduct the research on which this report is based is gratefully acknowledged. The views expressed in this report are not necessarily those of the Office of the Superintendent of Bankruptcy, Industry Canada, or of the Government of Canada. Our thanks also to the Canadian Association of Insolvency and Restructuring Professionals for its assistance in providing a random sample of trustees by region and size of practice for survey purposes.

² *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (*BIA*).

bankruptcy. While the financial disclosures are required to be accurate, declared causes of bankruptcy are unevenly reported, and other data that may better inform insolvency policy development are not collected.

The co-authors are deeply indebted to the scholars and insolvency professionals that took time from their busy schedules to answer a survey, speak with us on the telephone or in person, and generally reflect on the challenges for empirical research. We learned the greatest amount from US scholars, who have pioneered broad-based multidisciplinary longitudinal research projects that set the standard for solid and reliable empirical data. Here, we undertake an analysis of the options for scholars to access financially distressed consumer debtors, including what formal and informal mechanisms may be available and the kinds of protections that must be built into such investigations.

A working hypothesis of the project was that there is not yet adequate empirical research into consumer insolvency in Canada, such that our policy decision making is fully grounded in experience and informed decisions. Good empirical data assist with sound and informed policy making. Insolvency professionals, community members and government policy makers want some assurance that their policy choices are advancing the overall goals of the bankruptcy and insolvency system. In addition to good design that tests assumptions and underlying policy goals, better data collection design may also have the effect of beginning to empower those debtors that have accessed the system, in terms of allowing them to communicate their experiences more directly with policy makers. The study offers an assessment of effective research methodology for accessing insolvent individuals, which may enhance future research in the area of consumer insolvency. It makes a number of recommendations for enhancing data collection, including that there should be funding available for broad based multidisciplinary longitudinal empirical research and for qualitative and quantitative research on targeted topics. Such research must respect the privacy and dignity of consumer debtors while allowing accurate collection and analysis of data.

Part II briefly sets out the methodology for this report. Part III examines the scholarly literature, making a number of observations in respect of methodologies utilized in previous studies and how they can inform Canadian empirical study of consumer insolvency. Part IV analyses survey and interview responses from legal, medical, business and sociology scholars, and from insolvency professionals, in terms of their observations in respect of enhancing data collection. Part V examines current ethics considerations in research under the Canadian university system. Part VI concludes with several immediate recommendations for potential future research initiatives. It is hoped that this paper is the beginning of a dialogue in Canada in respect of creating a broad-based, accurate system of data collection and analysis, with a view to enhancing consumer insolvency law.

II. Research Methodology

The project commenced with an examination of the scholarly literature in Canada, the United States, Europe, and Australia, where studies have accessed both official records and insolvent consumers directly. The study also examined the literature more generally on surveying vulnerable populations to assess whether there are helpful policy or system design observations that can

be applied to the consumer insolvency context. The limit to this literature canvass was that only studies in English or French were examined.

The literature was used to formulate questions for the survey. Questions were then vetted by two scholars associated with the US Consumer Bankruptcy Project.³ These questions were then amended and approved by the OSB pursuant to its research funding requirements. A sample questionnaire is included as Appendix III. University ethics approval was sought and received.

The survey of insolvency scholars included legal, business, medical, public administration and political science scholars that have engaged in consumer debt research. The aim was to focus on benefits and obstacles to different kinds of data collection and analysis. We contacted all scholars that we could find in the literature that had written on consumer insolvency or consumer debt, asking if they would participate in the survey. Of 37 scholars contacted, 33 agreed to participate, six in person, eleven by telephone, and 16 by e-mail submission of the written survey. Of the four that declined, two did so because they had never conducted any empirical research in the area. Follow up questions arising from the surveys were sent in ten cases. By jurisdiction, seven scholars were located in Canada, 17 in the US, three in Australia and six in Europe, primarily the UK.

The study also surveyed 38 Canadian trustees in bankruptcy and five Canadian credit counselling professionals to ascertain their views. 50 trustees were asked, based on a random sample generated by the Canadian Association of Insolvency and Restructuring Professionals, by region, size of practice, gender, and rural or urban practice. The trustees responding were representative of all these factors. We wrote to all the credit counsellors listed in the national association of credit counsellors, but only five chose to respond, providing very helpful insights. All the surveys conducted with insolvency and credit professionals were written surveys, with follow up telephone conversations with four trustees. These surveys assisted in understanding how front-line professionals view the strengths and limitations of current data reporting requirements. In addition to the recommendations included here, a list of all other suggested research topics offered by survey respondents is listed in Appendix II attached.

Among the research questions examined were how data collection could be enhanced; the scope and limits of data collected under mandatory filing requirements; the appropriateness of written versus oral solicitations of information; effectiveness of in-person versus telephone surveys or interviews; potential avenues for accessing insolvent individuals who have not formally filed proposal or bankruptcy proceedings under the *BIA*; consideration of age, language and literacy in accurate data collection; differences in the requirements of university ethics boards in respect of surveying consumer debtors; and whether trustees, receivers and other insolvency professionals could be utilized more effectively in the collection of data.

The objective of this paper is to discuss the findings of the study, with a view to contributing to the knowledge base regarding conducting primary research with consumer debtors and bankrupts, in turn leading to enhanced data collection and policy choices. The limitations to the information collected here are two fold. First, the study was not able to research empirical work in languages other than English or French. We were not, however, advised of the existence

³ The project is discussed in Part III below.

of any such studies during our survey. More importantly, this study did not canvass consumer debtors directly to ascertain their views in respect of questions that should be included in studies or data that could be better collected. Consumer debtors, based on their experience with the insolvency system, can offer considerable insight into what questions should be asked to draw out the most comprehensive information.

III. Lessons from Previous Empirical Studies

There continues to be a serious lack of empirical analysis of consumer insolvency and bankruptcy in Canada. Yet the literature that does exist offers some important insights into the deficiencies in data collection and potential remedies. This part makes observations in respect of empirical research in Canada and the US, and to a lesser degree, Australia, the UK and parts of continental Europe. We examined research methodologies, including both major studies and more focused empirical research, particularly on how they aligned or advanced the particular research questions being posed and their insights in respect of undertaking empirical research. It is important to note that the studies contain valuable data and analysis that are not discussed here.⁴ Our focus was on the methodologies utilized.

1. Methodology in Canadian Studies of Consumer Insolvency

There have been fewer empirical studies in Canada than in the US, and earlier studies did not always contain a description of the methodology used for collecting data, in terms of whether samples were randomized, representative of regions or demographic profiles, etc. Over time, however, scholars have become acutely aware of the need to discuss both the strengths and limitations of their chosen methodology. They are cognizant of the extent to which conclusions can be drawn from a particular set of data.

One of the first empirical studies in 1980 found that consumer bankruptcy was a class related phenomenon, with most bankrupts living at poverty or near poverty as measured either by assets or income.⁵ That study identified money management and over-indebtedness as primary causes of financial distress. Seventeen years later, another study, aimed at understanding the increase in consumer bankruptcy, found many of the same results, suggesting a demographic configuration whereby few consumer debtors filing bankruptcy had surplus income to pay creditors, and where surplus income was available, it was a small amount over subsistence living.⁶ Saul Schwartz and Leigh Anderson found that, at the time, “unlike those seeking bankruptcy protection, those seeking credit counselling had some income that might be available to pay off their debts”.⁷

⁴ For a full list of the literature examined, see Appendix II Bibliography.

⁵ J.W. Brighton and J.A. Connidis, *Consumer Bankrupts in Canada* (Ottawa: Consumer and Corporate Affairs, 1982) at 76.

⁶ Saul Schwartz and Leigh Anderson, *An Empirical Study of Canadians Seeking Personal Bankruptcy Protection* (Ottawa: Industry Canada, 1998), report for the Office of Consumer and Corporate Affairs at Industry Canada, at 18; <http://strategis.ic.ca/ga/SSG/ca00889e.html>.

⁷ *Ibid.* at 75.

Professor Schwartz, further analyzing that data, suggested that the 1997 survey provided evidence against the hypothesis that attitudes towards bankruptcy have affected the bankruptcy rate.⁸ He argued that there was no empirical evidence to confirm the popularly held belief that debtors simply give up more easily than before.⁹ Schwartz concluded that bankruptcy policy in Canada was formulated more on anecdotes than empirical investigation, and that legislative amendments in consumer bankruptcy had placed too much emphasis on preventing alleged abuses and on educating allegedly incompetent debtors.¹⁰ He suggested that the need for systematic counselling had never been empirically established.¹¹ Schwartz recommended that future reform of the *BIA* should focus on ensuring that “the most heavily indebted Canadians can be given a fresh start”.¹² He also noted that problems in surveying consumer bankrupts included a lack of contact information, and a problem of the bankrupts’ names not being randomly drawn. His study influenced later work, in that scholars worked with the OSB to generate random selection sample files based on national and regional representation in bankruptcy filings.

In 1999, Professor Iain Ramsay, previously a legal scholar in Canada and now located in the UK, examined the relationship between empirical studies of bankruptcy and socio-legal analysis of the legal system by different groups.¹³ He examined findings from an empirical study of debtors that filed in 1994, concluding that most bankrupts were asset and income poor, and the major reason people filed was adverse employment changes and business failure.¹⁴ Ramsay concluded that in 1999, fewer lower income individuals had access to bankruptcy than in the 1970s or alternatively, that trustees had found more innovative ways of financing low-income bankruptcies.¹⁵ Ramsay argued that there was no empirical basis for the 1997 reforms to the *BIA*, for the mandatory counselling amendments in 1992, or for what he termed the “ritual degradation” ceremony, whereby trustees cut up the credit cards of debtors.¹⁶ He argued that bankruptcy policy making in Canada was not a rational process based on careful socio-economic analysis, rather, it was best understood in terms of interest group analysis.¹⁷ He was particularly concerned that the voice of individual bankrupts was not heard in process, rather, only the views of lawyers, trustees and creditors. Ramsay argued that changes to policy have often been driven by stereotypes, suggesting a need for more research on how bankrupts feel about the bankruptcy process.¹⁸

In examining files drawn randomly from the Toronto bankruptcy district, Ramsay argued that data on the statement of affairs were not particularly reliable because the data are entered at the time of filing, when the exact

⁸ Saul Schwartz, “The Empirical Dimensions of Consumer Bankruptcy: Results from a Survey of Canadian Bankrupts”, (1999) 37 Osgoode Hall L.J. 83-125.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.* at 22.

¹³ Iain D.C. Ramsay, “Individual Bankruptcy: Preliminary Findings of a Socio-Legal Analysis”, (1999) 37 Osgoode Hall Law Journal 15-82.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.* at 35.

¹⁸ *Ibid.* He observed that individual bankruptcy files provide a signal of economic problems attributable to broader economic and social forces.

amount of debt is often not known.¹⁹ He found generally that there was “shrinkage” in the amount of unsecured debt between the declaration of the debtor and the final statement of receipts and disbursements.²⁰ Ramsay also observed, as did Sullivan, Warren and Westbrook in the studies described below, that there was little enforcement activity by creditors prior to the debtor’s decision to file, raising questions in respect of what then actually drives consumer debtors to file under the *BIA*.²¹

Ramsay also examined the socio-economic demography of bankrupts, finding that often the occupation stated was too general to allow for meaningful analysis, although it did illustrate that bankrupt individuals represent a cross-section of the Canadian population.²² Ramsay argued that trustees record their opinion on causes of insolvency in one or two sentences, providing insufficient information.²³ Many of the observations made by Ramsay continue today, in that occupation is under-reported; there is insufficient data on debt-to-income ratio; and causes of bankruptcy are unevenly reported, depending largely on the willingness of the particular trustee to assist the debtor in articulating all relevant causes of insolvency.²⁴

Carol Ann Curnock undertook an analysis of the Canadian counselling program for bankrupts, her study spanning the period 1992 to 1999, from the time counselling became mandatory.²⁵ She identified problems in respect of

¹⁹ *Ibid.* The main sources of data in the files were the statement of affairs, the report by the trustee, and the statement of receipts and disbursements.

²⁰ *Ibid.* Ramsay observed that these findings were important data, but given that the data were limited to Toronto and Ontario, one should be cautious about making generalizations.

²¹ *Ibid.* at 66-67.

²² *Ibid.* at 11, 13. He also observed that homeownership in Canada does not mean one is well-off.

²³ *Ibid.* at 14.

²⁴ A number of Canadian legal scholars referred to a 1994 study conducted by Lance Roberts and David Forde, which we have been unable to locate. According to those citing the authors, in reviewing counselling policy, the authors conducted surveys and interviews with 179 trustees, 21 credit counselors and 1,204 bankrupts. They found that the first counselling session was overwhelmingly used for assessment, although half of those surveyed believed it should be used for counselling, revealing a disconnection between what professionals thought should occur and what was occurring in the first session. The study also apparently revealed considerable disagreement between respondents on the number of required sessions, as between one to three, with more than a third of those trustees interviewed noting the sessions had no effect on the bankrupts’ knowledge of financial management. Lance W. Roberts and David R. Forde, Insolvency Institute of Canada, “A National Assessment of Bankruptcy Counselling Services”, June 13, 1994, prepared for the Superintendent of Bankruptcy.

²⁵ Carol Ann Curnock, “Insolvency Counselling – Innovation based on the Fourteenth Century”, (1999) 37 Osgoode Hall L.J. 387-407. The 1988 study she is referring to was an unpublished report of the Bankruptcy Branch and she noted that only a few of the conclusions had been published, citing W. Clare, “Repeat Bankruptcies of Consumer Debtors” (1990) 10 *Insolv. Bull.* 201. Curnock suggests that the study was done without reference to research hypotheses, numbers of participants, methods of investigation and analysis or actual data. She also reported that it took her months and the help of the Bankruptcy Branch and CIPA to track down any information from the study. Curnock argued that the 1988 findings based on the 1,000 interviews were being published as “fact” and not “personal opinion”. *Ibid.* at 392.

research undertaken directly by bankruptcy officials, both in respect of how data is collected, including problems with interview skills of staff, and how it is interpreted. Her analysis of a federal government sponsored study of interviews with 1,000 bankrupts was that the findings gathered only personal opinion about behaviour such as gambling or drugs, without taking into account any factors such as the role of the economy, creditor behaviour, and the advice given by professionals.²⁶ Curnock argued that those delivering credit counselling had only very limited counselling credentials, with limited instruction time, lack of skills in respect of understanding a range of services available that allowed them to make referrals, and case examples during training that reinforced stereotypes.²⁷ She observed that assessments, such as the existence of mental health problems, were being made during counselling sessions, which in any other context would require a professional with many years of training.²⁸ Curnock also argued that the provincial association of insolvency practitioners had no guidelines for the protection of confidential material divulged during insolvency counselling.²⁹

Our research indicated that while the Canadian Association of Insolvency and Restructuring Professionals (CAIRP) does not have any rules on confidentiality specific to counselling, its *Rules of Professional Conduct* prohibit disclosure of any confidential information and prohibit members taking any interest, benefit or other action in which the trustee makes improper use of confidential knowledge obtained; and its *Code of Ethics for Trustees* also prohibits disclosure of confidential information.³⁰ Hence, there are confidentiality requirements in respect of counselling sessions undertaken by trustees.

Professors Saul Schwartz and Stephanie Ben-Ishai in a 2007 study concluded that the poor now have wide access to credit, fuelled by the increased availability of credit cards, by the ease with which consumer durables can be bought on credit, and, for some, by government-subsidized student loans.³¹ Sources for this article included an analysis of the *1999 Survey of Financial Security*, a wealth survey conducted by Statistics Canada. The authors also conducted “semi-structured interviews with nine Canadian bankruptcy trustees”, asking each trustee to characterize those who could not pay their normal fees.³² All the trustees interviewed had either participated in a bankruptcy assistance program case or worked on a number of files with less than 500 CAD in receipts.³³ The appendix to their study described the region

²⁶ *Ibid.* at 397.

²⁷ *Ibid.* at 401.

²⁸ *Ibid.* at 402.

²⁹ *Ibid.*

³⁰ Canadian Association of Insolvency and Restructuring Professionals (CAIRP), *Rules of Professional Conduct* specify: “6. A member shall not take any action (such as acquiring any interest, property or benefit) by which he makes improper use of confidential knowledge obtained in the course of a professional engagement”, and “12. A member shall not disclose any confidential information concerning any professional engagement unless required to do so by law”. The *Code of Ethics for Trustees* specifies: “Section 40 Trustees shall not disclose confidential information to the public concerning any professional engagement, unless the disclosure is (a) required by law; or (b) authorized by the person to whom the confidential information relates”

³¹ Stephanie Ben-Ishai and Saul Schwartz, “Bankruptcy for the Poor?”, (2007) 45 Osgoode Hall L.J. 471 – 512. Karen Maser and Johanne Pineau, Statistics Canada, *1999 Survey of Financial Security*, (2001), 13-595-XI.

³² Ben-Ishai and Schwartz, *ibid.* at 472-473.

³³ *Ibid.* at 501.

and type of practice for each participating trustee.³⁴ The authors analyzed all summary administration bankruptcies for which a statement of receipts and disbursements was electronically submitted between January and December 2006. Summary administrations were chosen as it is poorer debtors that access this procedure. These data had been electronically filed and contained amounts of voluntary payments by debtors, dividends disbursed to creditors and trustee fees. The authors noted that while they were only examining statements submitted electronically, they did not anticipate bias in the data. The statistical information was generated using 29,279 electronically filed cases with the OSB. Many variables, including the dividend paid to creditors and the level of trustee fees could be accurately captured; however, the value of voluntary payments made by the debtor to the trustee were estimated because the authors observed that trustees were not required to report such payments in a consistent fashion.³⁵ Schwartz and Ben-Ishai concluded that consumer bankrupts that are poor are not only insolvent at the time of filing for bankruptcy, but are likely to have been poor for some time and are likely to remain in poverty for the foreseeable future as their earning prospects are limited and their life circumstances are such that significant barriers will impede any upward economic mobility.³⁶

Professor Ben-Ishai, in a different study, suggests that there is bias in the rhetoric against the permanently poor, viewed as a lost cause, compared with bankrupts, who are offered a “fresh start” and able to become self-reliant members of society again.³⁷ In particular, there is a contrast in respect of what consumer debtors are allowed to keep under bankruptcy and what they are allotted by the government under social assistance programs. She argues that the ideology and practice of consumer bankruptcy in Canada contribute to perpetuating inequalities in class, gender and race; that studies in respect of bankrupts are that they are “deserving middle class people”, contrasted with the poor, who are seen as “lazy, unmotivated and deceptive”.³⁸ Ben-Ishai argues that trustees are biased against people because of their own backgrounds, as trustees are mostly male and over age 50.³⁹ She observes that government studies have failed to address policies related to insolvency, such as reductions in health care spending, provisions for child care and elder care.

While not a scholarly study, it merits note that there was considerable debate in respect of the research methodology of the Personal Insolvency Task Force (PITF) Final Report.⁴⁰ Created in 2000, the government Task Force was established to review the provisions of the *BIA* as it pertained to personal bankruptcies; to identify legislative changes to the Canadian insolvency system; to recommend appropriate mechanisms to assist low income debtors; and to ensure the system is accessible and effective. Its members included judges, lawyers, bankruptcy trustees, creditor representatives, academics and

³⁴ Appendix III: Notes on Data, *ibid.* at 512.

³⁵ *Ibid.* However, they note that most trustees, however, report them by noting their existence in the statement of receipts and disbursements.

³⁶ *Ibid.*

³⁷ Stephanie Ben-Ishai, “The Gendered Dimensions of Social Insurance for the ‘Non-Poor’ in Canada, (2005) 43 Osgoode Hall L.J. 289-319.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Personal Insolvency Task Force, *Final Report*, August 2002, i-120
[http://strategis.ic.gc.ca/eic/site/bsf-osb.nsf/vwapi/pitf.pdf/\\$FILE/pitf.pdf](http://strategis.ic.gc.ca/eic/site/bsf-osb.nsf/vwapi/pitf.pdf/$FILE/pitf.pdf)

credit counsellors.⁴¹ Seven meetings were held, as well as numerous meeting of sub-groups.⁴² The Task Force acknowledged in its final report that the tight time constraint had been a problem. Budget was also reported as a problem as there was no systematic program of research designed and implemented.⁴³ The Report's recommendations laid the foundation for subsequent public policy debates and the basis of many of the reforms that were recently enacted or are about to be proclaimed in force.⁴⁴

Professor Iain Ramsay, in a dissent in the PITF Final Report, suggested that there had been an unrealistic timeframe for the report, an absence of a research budget, and no attempt to work systematically through the implications of any research the PITF conducted and other existing research for policy recommendations.⁴⁵ He concluded that as a consequence, the research did not inform the policy recommendations or provide a framework for analyzing the impact of specific recommendations; and that there was no reliable data on the failure rate for proposals.⁴⁶ He posed a series of research questions that continue to be relevant and unexplored today; including, the role of insolvency professionals in dealing with vulnerable populations who often are without access to legal advice; and the problem of relegating policy development to industry insiders, suggesting that law reform commissions may be more appropriate investigatory bodies.⁴⁷

Professor Jacob Ziegel also wrote a dissent in the PITF Final Report.⁴⁸ He had reservations about the way that the Task Force discharged its mandate, observing that close scrutiny should have taken place to determine how well the system serves consumers, what could be done to reduce the escalating level of debt and number of insolvencies, and how one could impose some accountability on the credit industry. He observed that there was a failure to assess the impact of the 1992 amendments; an unrealistic time frame of one year to complete the report; an unwieldy size of the Task Force; and the absence of important constituents in the process, such as sociologists, behavioral psychologists, and registrars.⁴⁹ He also suggested that the Task Force had failed to explore options that other countries have developed.⁵⁰ The dissents laid the foundation, at least in part, for some of the current research initiatives funded by the OSB.

In 2006, co-author Janis Sarra conducted a two-part study of elderly insolvent debtors, the first part with co-investigators Angela Redish and Margaret

⁴¹ *Ibid.* at 1.

⁴² *Ibid.* at 1, 11.

⁴³ *Ibid.*

⁴⁴ *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, Statutes of Canada, Chapter 36, Royal Assent, 14 December 2007, part proclaimed in force 7 July 2008; the rest expected to be proclaimed in force in 2009 (Chapter 36).

⁴⁵ Iain Ramsay, "Reservations and Dissent", in Personal Insolvency Task Force, *Final Report*, *supra*, note 40 at 93-96.

⁴⁶ *Ibid.* at 94-95.

⁴⁷ *Ibid.* at 96.

⁴⁸ Jacob S. Ziegel "Reservations and Dissenting Views on the Task Force Report", *supra*, note 40, 97-102 at 98.

⁴⁹ *Ibid.* at 99.

⁵⁰ *Ibid.* at 101.

Schabas.⁵¹ The study provided a first glimpse into the economic, legal, and social factors that are important to understanding the over-indebtedness or bankruptcy of older consumers and how they are less likely to be able to recover economically and socially from the bankruptcy.⁵² The study found that addressing the issue of credit card over-indebtedness was an urgent public policy priority, as the scope, prevalence, and quantum of credit card debt among older Canadian bankrupts is such that they cannot realistically pay off their credit card debt.

The first part of the study involved design of research fields for retrieval of electronic records, working with staff and economists at the OSB. The study then analyzed a sample of 1,000 cases of bankrupts over age 55 to determine the causes of bankruptcy. One problem that currently exists with the information required by the OSB is that there are not separately captured fields for cause of bankruptcy. Hence, the data on causes had to be manually pulled from the files, assessed in terms of the primary cause (self-declared) of bankruptcy, and then entered into an Excel database. A methodology for analyzing the data was developed, coding variables within cases on a consistent basis so that comparisons could be generated across age cohort and region. One limitation to analyzing these data was that there were instances in which bankrupts listed more than one cause of bankruptcy, for example, job loss combined with over-extension of credit, which is masked by analysing only the primary cause.

The second stage of the research project was to analyze the full data set of 7,797 bankruptcy files of consumer bankrupts over age 55 who filed in 2003 to 2005, by retrieving data and undertaking analysis of the data by age cohort, region, type and quantum of debt, asset level, income level, and gender. The issues faced by those aged 55–65 were found to be quite different than those over age 65 or 75, illustrating the merit of analysing the data by specific age cohort. The third part of the study was to design and conduct a national qualitative survey by interviewing recent consumer bankrupts over age 55, aimed at enhancing the raw data. The qualitative study was undertaken in conformity with privacy legislation and university ethics approval. Given the age cohort, it was expected that most of the information would be gathered in telephone interviews; however, an offer was made in the greater Vancouver area to conduct the interviews in person if the individual wished.

There were considerable challenges for conducting the qualitative part of the empirical study. The objective was originally 100 participants. The questions were formulated with the assistance of five bankruptcy trustees, who discussed their recent experiences with consumer bankrupts over age 55.⁵³ The ethics approval for the *Growing Old Gracefully Study* required seven months and

⁵¹ Janis Sarra, “Growing Old Gracefully, An Empirical Investigation into the Growing Number of Bankrupt Canadians over Age 55”, in J. Sarra, ed., *2006 Annual Review of Insolvency Law* (Toronto: Carswell, 2007). There were two studies; the first conducted with scholars Angela Redish and Margaret Schabas of UBC economics and philosophy faculties respectively, which was reported to the OSB. The second study gathered considerably more survey data, but Professors Redish and Schabas were unable to participate in the study or subsequent report.

⁵² Unlike younger consumer debtors that can utilize the bankruptcy provisions to shed onerous credit obligations and have a “fresh start” in terms of earning capacity, credit history, and quality of life. *Ibid.* The aging population and shifting social safety nets and familial supports are likely contributors to this trend.

⁵³ *Ibid.* There were 15 questions in the survey.

three amendments to the application because of concern by the Ethics Board about the vulnerable nature of the survey group. When approval was granted, the conditions were very specific and limited. The research team was prohibited from following up on the initial letter and consent form with a telephone call unless the consent had been mailed in. Since there is a much greater likelihood of participation when letters are combined with personal contact, this limited the number of possible participants in the survey. The Ethics Board declined to approve an accompanying letter from the OSB on the basis that the bankrupt person may feel pressure to cooperate given the involvement of the OSB. Our view was that such a letter would have assisted in reassuring older bankrupts of the value and legitimacy of the survey. The Ethics Board also declined to allow trustees who work with bankrupts to approach possible participants.⁵⁴ The Ethics Board also required that the letter outlining the purpose and goals of the study had to specify that the survey would cause the participant stress. We conjecture that this may well have been a factor in the number of willing participants. Also of note is that as interviewers, we were not allowed to deviate from the 15 approved questions, even where a follow up question might have been warranted. We respect the importance of uniformity in the survey, but also believe that the process itself might have unearthed additional factors had more questions been admissible. The Board also imposed a very high standard of confidentiality and protection of privacy requirements, which we deemed appropriate given the vulnerability of this population.

Once ethics approval was received, 400 letters were mailed to participants based on a random list by region generated by the OSB. The letters were accompanied by the questions that would be asked; a covering letter setting out the project, including names and contact numbers of the person surveying; consent forms; and self-addressed stamped envelopes. The study required that the covering letter include ethics department contact information for complaints about the survey. All letters offered a copy of the survey in French; and for Québec residents, both English and French questionnaires were mailed at the outset.

Of the 400 letters initially sent, 81 letters returned as moved, a figure very high for an older population. This may reflect continuing financial uncertainty and thus frequent dislocation, although there was no clear evidence. Eight letters were returned by a family member, advising that the bankrupt had passed away. Ultimately, only 16 bankrupts agreed to be surveyed in the first round of requests for interviews, all by telephone.

In the summer of 2006, Sarra acquired further research funding and conducted a second study, sending another 400 letters to those who had declared bankruptcy in 2005 in the age cohort, as well as a second mailing to the almost 300 people who were originally sent the letter for whom it was believed addresses were still valid. This time 76 agreed to be surveyed, bringing the total in the cohort in the qualitative study to 92 people. The survey yielded observations congruent with the findings of the 1,000 sample, in terms of the primary causes of bankruptcy. However, it also provided much more detailed information, most significantly, on the multiple factors contributing to bankruptcy. The qualitative survey supplemented the global electronically filed data, providing further substance and texture. The study recommended that

⁵⁴ Trustees have multiple roles in the Canadian bankruptcy system, including realization of assets for the benefit of creditors; assisting the debtor in filing bankruptcy; serving as a proposal trustee; and counselling bankrupts.

consideration should be given to additional survey research seeking participation of a broader number of people.

While public policy in Canada suggests that there should not be stigma attached to filing bankruptcy, the survey responses indicated that older consumer debtors, particularly over age 65, continue to feel a fair degree of emotion and embarrassment associated with bankruptcy. This embarrassment may account for a delay in seeking financial assistance as they begin to experience financial distress. The study also identified that further examination is needed in respect of whether bankruptcy is the appropriate mechanism for relief of over-indebtedness for those that are approaching the limits of their income earning years.

In a 2008 study by Janis Sarra on consumer debtors utilizing proposals proceedings under the *BIA*, data analysed shed some light on consumer insolvency proceedings and raised further questions for research.⁵⁵ The study used data on consumer debtors 2005-2007, involving 5,773 individual insolvencies; examining 2,967 consumer debtors that filed Division II proposals; 1,063 Division II business proposals involving sole proprietors/individuals; 743 Division I proposals made by insolvent consumer debtors; and 1,000 consumer bankruptcy files. The data was generated from the OSB database by region across Canada to be representative of the breakdown of the debtors filing in various regions, in proportion to numbers filed, size of estates and type of file, in order to create an accurate representative sample. The samples were randomly drawn. The study then analyzed the cases to determine the causes of insolvency, again drawing the data manually and trying to ensure consistency in reporting. Protocols for inputting data and a methodology for analyzing the data were developed, coding variables within cases on a consistent basis so that comparisons could be generated across region and cohort. The author undertook a random second-check on 300 files to verify consistency in the inputting of data. For purposes of examining the files, the study took the declared primary and secondary causes, noting that there are frequently synergistic contributions to financial distress that are not captured when reporting global statistics.

The second stage of the research project was to analyze the full data set of the 5,773 files from 2005-2007 by retrieving data and undertaking analysis of the data by region, type and quantum of debt, asset level, and income level. This work allowed for global analysis of the data for which there were discrete fields. The information generated by study of the data was supplemented by information gathered from a sample group of ten trustees in bankruptcy that work on a daily basis with consumer debtors. There were a number of research questions that the project sought to answer, including whether the causes of financial distress were a determinant of choice of proposal or bankruptcy; the impact different timing periods for rehabilitating one's credit rating have on the decision to make a proposal or not; and whether current surplus income requirements created normative pressure to select a particular proceeding. A limitation of the study was that it did not seek the direct input of consumer debtors through survey or other means.

Professors Ruth Berry and Karen Duncan, in their work on payday loans, conducted a literature search and then accessed OSB and other data,

⁵⁵ Janis Sarra, "Economic Rehabilitation: Understanding the Growth in Consumer Proposals", Report to the OSB May 2008, (Forthcoming, Toronto: Business and Finance Law Review, 2009).

Financial Consumer Agency of Canada surveys and Public Interest Advocacy Centre studies.⁵⁶ The sample data was drawn by the OSB and size was determined based on the volume of summary administration bankruptcies or Division II proposals filed in each census area for Canada's six largest cities.⁵⁷ Form 79 statements of affairs were used to collect the names of payday lenders included in the list of creditors and the authors also used the list of members from the Payday Loan Association. A sample of personal bankruptcy and proposal filings was selected randomly from records and detailed financial information was taken from these records, including household income, assets, debts, debt-income ratio, employment status, gender, marital status, household size and number of dependents. Information about payday loans was compared to other loans such as mortgage, student loans, credit card debt, installment loans and automobile loans. Approximately 1,000 files with pay day loans were examined.⁵⁸ The data showed that unattached individuals aged 18-34, younger families, and married couples with children were more likely to use payday loans, and spending tended to exceed income.⁵⁹ The authors note that the data in the e-files had been collected by bankruptcy trustees for record keeping rather than for research purposes, and thus they found inconsistencies in responses to questions asked of debtors.⁶⁰

In summary, there have been no broad based longitudinal empirical studies of consumer insolvency in Canada. While Canada for many years generally lacked empirical research, in recent years some efforts have been undertaken to develop projects, still somewhat limited in their scope. The OSB has aided considerably in this change, as has the Canadian Insolvency Foundation, but underfunding for research continues to be a serious problem. While scholars did not originally try to fully describe methodology and its limitations, that has changed and there is growing recognition that the methodology must be aligned with and responsive to the research questions and working hypotheses; and must be described so that others assessing the data can understand their strengths and limitations. Specific recommendations for future research in Canada are described in Part V below, and include, most importantly, a recommendation for broad based multidisciplinary longitudinal empirical research.

2. Insights from Methodology in US Studies

In contrast to Canada, there is a rich body of literature in the United States (US). In particular, there has been important scholarship generated through collaboration in the Consumer Bankruptcy Project, a broad based multidisciplinary longitudinal research program initiated in 1981 by scholars Teresa Sullivan, Elizabeth Warren and Jay Westbrook, and continued with a

⁵⁶ Ruth E. Berry and Karen A. Duncan, *The Importance of Payday Loans in Canadian Consumer Insolvency*, Department of Family Social Sciences, Faculty of Human Ecology, University of Manitoba, (2007); <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02026.html>. Financial Consumer Agency of Canada (FCAC). (2005). Public Experience with Financial Services and Awareness of the FCAC; <http://www.fcacafc.gc.ca/eng/media/PDFs/PublicExpFinServAwareRpte.pdf>.

⁵⁷ Berry and Duncan, *ibid.* at 8, with a reported 95% confidence level and a 5% margin of error.

⁵⁸ *Ibid.* The study does not contain a total number; we added files in the tables to arrive at best estimate. The author was unable to provide a more accurate number.

⁵⁹ *Ibid.* at 4.

⁶⁰ *Ibid.* at 9.

growing number of collaborating scholars.⁶¹ Each study has increased the number and type of discipline of participating scholars; and each has worked with the US bankruptcy courts or bankruptcy professionals. All were funded by grants from government agencies or non-profit institutions.⁶²

The Consumer Bankruptcy Project (CBP), to date, consists of four empirical studies of the economics and demographics of consumer bankruptcy debtors, undertaken in 1981, 1991, 2001, and 2007 for individual debtors filing under either Chapter 7 or Chapter 13 of the US *Bankruptcy Code*.⁶³ Each new study has built on previous information, creating a longitudinal set of data that allow scholars to track developments in a meaningful way. However, each study also added to both the methodology and the scope and type of data collected, as scholars have acquired more experience in collecting data, identifying key data points, and reflecting financial and legal changes. What the CBP offers is a rich and detailed analysis of bankruptcy, an objective that should arguably be adopted in Canada. Because the studies have spanned over 25 years, the scholars have adjusted all data to 2007 dollars using the Consumer Price Index, by multiplying each individual piece of data from the prior studies, allowing for cross-study comparisons of data.⁶⁴

Scholars in the CBR report that “there is no single, perfect standard for classifying a case as a consumer case, rather than a business case. If the debtor’s name on the bankruptcy petition was not that of an individual person, i.e., it was a legal entity such as a corporation or a partnership, the case was treated as a business matter” and excluded from the study.⁶⁵ As noted in the Sarra study above, Canada also faces challenges in terms of delineation of “consumer debtor”, dividing its data collection based on whether the individual debtor has 50% or more of his or her debts related to business.

The 1981 project (CBP I) built the sample from selection of individual bankruptcy cases filed during the 1981 calendar year. It had a limited

⁶¹ The Consumer Bankruptcy Project (CPB) has conducted surveys and interviews and analyzed court filings and other data for large sample populations for 1981, 1991, 2001 and 2007, producing a series of research papers. See for example, Teresa A. Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, “Folklore and Facts: A Preliminary Report from The Consumer Bankruptcy Project”, (1986) 60 Am. Bankr. L.J. 293 (1981 CBP data); Teresa A. Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, “Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-91”, (1994) 68 Am. Bankr. L.J. 121 (1991 CBP data); Teresa A. Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, “Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings”, (2006) 59 Stan. L. Rev. 213 (2001 CBP data); Teresa A. Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *As We Forgive our Debtors: Consumer Credit and Bankruptcy in America* (Oxford University Press 1989); Teresa A. Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *the Fragile Middle Class: Americans in Debt* (Yale University Press, 2000); Elizabeth Warren and Amelia Warren Tyagi, “The Two-Income trap: Why Middle Class Mothers and Fathers are Going Broke” (Basic, 2003); Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A. E. Pottow, Deborah K. Thorne, and Elizabeth Warren, “Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors”, (2008) 82 American Bankruptcy Law Journal 349-406.

⁶² Lawless *et al*, *ibid*.

⁶³ *Ibid*. at Appendix 1.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

geographic scope, with a sample of 150 cases filed in each of ten federal judicial districts in three states.⁶⁶ The quantitative data in the CBP I was taken solely from the bankruptcy petition and schedules and the court docket, which provided a detailed profile of debtors' financial conditions at the time of bankruptcy, including income, assets, and debts. These data were supplemented with interviews with bankruptcy judges and lawyers who were asked to describe the consumer bankruptcy system.

The second study in 1991 (CBP II) collected data on income, assets and debts from bankruptcy court records; this time adding a second research instrument, a written questionnaire that gathered demographic data that were not available in the court records.⁶⁷ The questionnaires were given to debtors who filed cases in the states of Illinois, Pennsylvania, Texas, California, and in two judicial districts in Tennessee. The questionnaires were distributed to debtors at the required meeting with the bankruptcy trustee assigned to their case, although occasionally, the questionnaire was given to the attorney or debtor at the time of the bankruptcy filing.⁶⁸ Those debtors who did not complete or partially completed the questionnaire were excluded from the sample. This procedure was subject to response bias, but prior analysis found minimal evidence of such an effect in the financial data.⁶⁹ The written questionnaire was voluntary and confidential, a single page, and consisted primarily of closed-ended questions, available in English and Spanish. The questionnaire gathered demographic data on each debtor's age, gender, education, occupation, marital status, educational background, and race or ethnicity.⁷⁰

The CBP III (2001) increased the size and interdisciplinary nature of the research team.⁷¹ Additional research instruments were added, specifically a comprehensive written questionnaire given to consumer bankruptcy debtors at the required meeting with their trustees. It included demographic data and reasons for bankruptcy as gathered in prior studies, information on each debtor's medical bills, homeownership and home loans, self-employment status, and pre-bankruptcy situation. On its last page, the CBP III questionnaire offered 50 USD to debtors who would complete follow-up telephone interviews. The researchers coded data from the debtor's corresponding bankruptcy court records, the total sample was 1,250. Telephone interviews were conducted with all debtors who indicated a willingness to be interviewed, a response rate of 48%.⁷² This interview was conducted approximately one year after the bankruptcy cases were filed. Debtors were asked about general issues, medical issues, small business ownership, and home ownership.⁷³ In 2004, approximately three years after the debtors in the CBP III sample had filed bankruptcy, a second round of interviews was conducted with all debtors who completed the one-year interview and could be reached. This sample consisted of 474 families from the core questionnaire sample of 1,250 cases, translating into a response rate for the three-year interview of 37.9%.⁷⁴ The telephone interviews were conducted by a team of trained researchers using computer-assisted interviewing technology. Across the first three studies, the court record

⁶⁶ Illinois, Pennsylvania and Texas. Lawless *et al*, *supra*, note 61.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

⁶⁹ *Ibid*.

⁷⁰ Sullivan, Warren and Westbrook, *Ten Years Later*, *supra*, note 61 at 125.

⁷¹ Lawless *et al*, *supra*, note 61.

⁷² *Ibid*.

⁷³ *Ibid*.

⁷⁴ *Ibid*. at Appendix I, Detailed Methodology, at 387-398.

data offered a consistent set of variables that measured the economic profiles of people who filed bankruptcy cases.⁷⁵

CPB III thus succeeded in mapping debtors' experiences at filing, then one and three years following, which enabled analysis of whether statutory reforms produced the results sought in the US bankruptcy system.

CBP IV was conducted in 2007, when investigators concluded that sufficient time had passed from enactment of the 2005 amendments to the *Bankruptcy Code* to measure the effect on consumer debtors. Robert Lawless *et al* have recently reported on data from CBP IV, analyzing whether reforms to consumer bankruptcy law in the US failed.⁷⁶ Aside from the significance of their data, the methodology used by the authors is important in considering further empirical research in Canada. The CBP IV established the most complete database of consumer bankruptcy debtors collected to date, using a random national sample of all bankruptcy cases, with court record data and questionnaire data available for approximately 2,500 consumer bankruptcy cases.⁷⁷ The investigators offer a comprehensive description of the methodology used. Several aspects merit note here.

First, immediately after the filing data was collected, potential respondent debtors were mailed letters that briefly described the study and explained that they would receive a questionnaire in the mail within the next few days, including a note offering a Spanish version of the questionnaire. One week later, questionnaire packets were mailed to all respondents, including a cover letter, questionnaire, a stamped return envelope, and 2 USD in cash as a token of appreciation. The responses to these questions were used in identifying certain debtors for subsets of specialty questions in the telephone interviews.⁷⁸ The questionnaire also asked debtors what they did to cope financially before they filed for bankruptcy and what circumstances contributed to their bankruptcies, and provided empty space for debtors to tell the stories of their bankruptcies in their own words. The final page of the questionnaire asked debtors if they would be willing to complete a telephone interview, for which they would be paid 50 USD for their time. Follow-up included thank you and reminder letters, and telephone calls to remind debtors to return the questionnaires. One month after initial questionnaires were mailed, replacement questionnaires, along with another 2 USD in cash, were mailed to those households that had not yet responded to the initial questionnaire mailing.⁷⁹ The response rate was 50%, and of these 2,521 responses, 91.8% questionnaires were returned complete. Tests of inter-coder reliability and coding error procedures assisted with a high degree of data quality.⁸⁰

Of the 2,314 completed questionnaires that were returned from the random sample, 86.7% of respondents indicated that they were willing to participate in a follow-up telephone interview.⁸¹ Interviews were completed with 1,032 respondents, 51.4% of those willing to be interviewed, the investigators finding

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* at 392.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.* at 394. Initially, all data were cleaned of obvious errors and inconsistencies. To test inter-coder reliability, a random sample of 10% of the court records were blind coded a second time concomitantly with the regular coding.

⁸¹ *Ibid.*

no indication of a response bias.⁸² The median length of the interviews was one hour, fifteen minutes. The interviews were conducted using computer-assisted telephone interviewing. Questions were pre-tested using mock interviews. The interviewers received extensive training on both the computer-assisted interview technology and on interview techniques.⁸³ All of the interviewers were women, ranging in age from their mid-20s to late-50s. Many debtors had irregular work schedules that required interviewers to contact them very early in the morning or late in the evening, and hence, flexibility in times offered was an important factor. In many instances, the stories of debtors were sufficiently distressful or emotionally draining that the interviewers could complete only a few interviews at a time.⁸⁴

The data indicate that those who filed in 2007 had, for the most part, the same income profile as those who filed in 2001. CBP IV found that families in bankruptcy were much more deeply in debt; their negative net worth sank further, and their debt-to-income ratios rose higher. The data also support Professor Ronald Mann's "sweat box" theory of consumer lending, in which lenders profit if failing customers can be persuaded to make high-interest payments for a few extra months, suggesting that the 2005 amendments delivered a very different benefit to the credit industry than its supporters claimed.⁸⁵ The data challenge the efficacy of the means test introduced into US bankruptcy law in 2005, finding that the results do not achieve what legislators claimed the goals of the amendments were. Debtors who filed for bankruptcy in 2007 had much more credit card, and greater medical, utility, and other unsecured debt. These debts were either due immediately, such as utilities payments, or they were very expensive when financed long-term, such as credit card debt.⁸⁶

The CPB IV authors suggest that absent the 2005 legislative amendments, there would have been an additional 800,000 people that would have been expected to file under the pre-2005 amendments, who did not file.⁸⁷ They observe that they lack the means to detect and study these "would-have-filed families directly", but they do draw some inferences from the data and trend lines, observing that the amendments do not appear to be sorting "can-pays

⁸² *Ibid.* at Appendix I, Detailed Methodology, at 387-398.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Ronald J. Mann, "Consumer Bankruptcy and Credit in the Wake of the 2005 Act: Bankruptcy Reform and the 'Sweat Box' of Credit Card Debt", (2007) U. ILL. L. REV. 375 at 398. The authors in the CBP note that: "The advent of Automated Access to Court Electronic Records ("AACER"), a private business designed to collect data each day about every bankruptcy case in the country, transformed the data landscape", *ibid.*

⁸⁶ Lawless *et al*, *supra*, note 61. See also Sumit Agarwal, John C. Driscoll, Xavier Gabaix and David Laibson, *Learning in the Credit Card Market* (2008), National Bureau of Econ. Research, Working Paper No. W13822; <http://www.nber.org/papers/w13822>, at Appendix A, who reported a data set that contained three years of credit card statements, representing 120,000 consumers and 4 million credit card statements. The credit card issuer was charging average annual late, over-limit and cash advance fees of 141 USD per account and 226 USD in penalty interest in 2002-2004, with a mean monthly balance of 1,735 USD. The issuer would net 44 USD million per year from fees and penalty interest charges.

⁸⁷ Lawless *et al*, *ibid.* at 375-376.

from can't pays", rather, "it appears to be sorting can't-pays with high debt loads from similar income range can't-pays with even higher debt loads".⁸⁸

In both 2001 and 2007, the telephone surveys of the families in bankruptcy included questions about how long they had been seriously struggling with their debts before they filed for bankruptcy and about their experiences with debt collectors. The authors note that when they designed the question, they had not fully anticipated how long people struggled with debts before filing. 43.8% of debtors in 2007 responded that they struggled more than two years before filing, a jump from 32% in 2001. The authors observe that "thus it may not be that the 800,000 non-filers have truly left the system; they may just be circling the drain longer".⁸⁹

The CBP data have generated a number of important studies, including more in-depth examination of particular aspects of the data collected, suggesting that Canada could benefit tremendously from a similar project.

Teresa Sullivan, Elizabeth Warren and Jay Lawrence Westbrook analysed CBP data over 20 years.⁹⁰ They concluded that despite claims to the contrary, the stigma of bankruptcy is likely increasing. Economists had been claiming that the stigma was declining because they couldn't find a strong statistical correlation between bankruptcy and a handful of macro-economic indicators. Drawing on the 1981, 1991 and 2001 data, Sullivan, Warren and Westbrook found nothing to support this view; rather, they found the opposite, that stigma is increasing. They hypothesized that the growth was related to greater stress rather than declining stigma.

Professors Sullivan, Warren and Jacoby explored the financial impact of medical problems in the US using a survey of 1,974 bankrupts in eight federal jurisdictions.⁹¹ They found that one quarter of US debtors identified an illness or injury as their reason for filing bankruptcy, and that more than half a million debtors listed substantial medical bills as a reason for filing. The survey questions utilized were broad, capturing data such as costs associated with medical expenses.⁹² The study was able to effectively document the significant number of debtors that had no health insurance for themselves or family members and those that had outstanding debt to healthcare providers. They found, however, that more than half of the debtors that gave a medical reason for filing had no medical bills listed.⁹³ The authors tentatively concluded that there were several possible reasons; first, paying their medical bills pushed debtors into filing; second, the medical bills were paid, but the medical problem

⁸⁸ For example, they write: "First, it could be that the missing 800,000 had debt loads and debt-to-income ratios similar to the (worsened) profiles of those filing for bankruptcy in 2007. Second, it could be that they had better debt loads and debt-to-income ratios than those who filed for bankruptcy in 2007—that they were, relatively, better off—but that they still had worse loads and ratios than those who were filing for bankruptcy in 2001.⁸⁷ Neither strikes us as an encouraging development." *Ibid.* at 376.

⁸⁹ *Ibid.*, citing also Robert M. Lawless, "The Paradox of Consumer Credit", (2007) U. Ill. L. Rev. 347.

⁹⁰ Teresa Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, "Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings", *supra*, note 61.

⁹¹ Melissa B. Jacoby, Teresa A. Sullivan and Elizabeth Warren, "Medical Problems and Bankruptcy Filings", (2000) Norton's Bankruptcy Adviser.

⁹² *Ibid.*

⁹³ *Ibid.* at 7.

caused lost income or employment; or third, medical bills to healthcare providers were paid on credit cards or a mortgage was increased to cover the medical costs.⁹⁴ Analysing the data by marital status, they found that women and couples experience the greatest rate of bankruptcy due to medical problems.⁹⁵ The study highlighted the masking of causes that can occur where unsecured consumer debt such as credit cards are used to pay for medical care, important to consider in future survey design.

Professors Jacoby, Sullivan and Warren published a further study in 2001, presenting further data from their 1999 study.⁹⁶ They found that more than half a million middle class families turned to bankruptcy courts for help after illness or injury in 1999. They observed that since bankruptcy serves as part of the health care payment system, bankruptcy policy should be included in any comprehensive review of health care. Until the 1990s, most empirical studies of bankruptcy did not find illness, injury, or medical debt to be a major cause of bankruptcy, based largely on the questions being asked in data collection.⁹⁷ They examined methodological differences in prior and current data collection, finding that medical debt is hard to discern as medical expenses are often paid on credit cards.⁹⁸ The authors found that interviews allowed debtors to more accurately describe the reasons they were in debt and to distinguish the main reason for financial distress from the contributory reasons.

The challenge for the investigators was to classify interview data for quantitative analysis, in addition to the difficulties of locating debtors and have them willing to complete the survey. The authors also noted the continuing stigma attached to bankruptcy as a factor in response rate. The questions posed included survey questions designed to approach medically related bankruptcies from multiple perspectives; asking a family member to identify the family's reasons for filing, with a choice of 16 answers and an "other" category. The survey asked questions relating specifically to medical debts; asking whether debtors had medical bills not covered by insurance in excess of 1,000 USD during the prior two years.⁹⁹ The study found that women and women headed households filed more often for medical reasons; that one half of all bankruptcies had a medical related problem; almost half with medical causes were elderly; and that 80% had health insurance.¹⁰⁰ The data provided new insights into how medical causes should be investigated and analysed, exploring the policy implications of the study's findings on the health care finance and bankruptcy systems.

In the US, the Public Access to Court Electronic Records (PACER) data base has been frequently used as the source of empirical data.¹⁰¹ PACER is an

⁹⁴ *Ibid.* at 9.

⁹⁵ *Ibid.*

⁹⁶ Melissa B. Jacoby, Teresa A. Sullivan and Elizabeth Warren, "Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts", (2001) 76 New York University Law Review 2.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* at 383.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ <http://pacer.psc.uscourts.gov/pacerdesc.html>.

The PACER System offers an inexpensive, timely, and comprehensive case information service on a fee for service basis. PACER allows scholars and others to request information about particular cases. The Judicial Conference of the United States, the judicial governing body of the US Federal Courts, has been granted

electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, through the Internet. PACER is a service of the United States Judiciary, run by the Administrative Office of the United States Courts. Links to all courts are provided on PACER; electronic access is available by registering the PACER Service Center, the judiciary's centralized registration, billing, and technical support centre. In the US, each court maintains its own databases with case information. The information from each court is comparable; however, the format and content of information provided can sometimes differ slightly, requiring scholars to take account of differences in their analysis.¹⁰²

Deborah Thorne and Leon Anderson, in conducting in-depth interviews with 37 newly bankrupt families, found that stigma remains a pervasive feature of the landscape of contemporary consumer bankruptcy.¹⁰³ Interviews showed that newly bankrupt individuals rely on a wide range of management techniques that are typically employed by members of other stigmatized groups.¹⁰⁴ Thorne and Anderson's interview respondents reported that prior to their bankruptcies, they shared the prevailing social sentiment that people who file are deadbeats who intentionally "rip off the system."¹⁰⁵ Thorne and Anderson found that when confronted with their own financial failures, debtors relied on recognized techniques to manage the stigma; specifically, they tried to hide their circumstances from others, to differentiate themselves from those people whom they believed would fit the stereotype of illegitimate bankruptcy filers, and provided justifications for their financial distress.¹⁰⁶ The authors conclude that stigma is still very much part of the bankruptcy landscape.

Leslie Linfield has observed that during the credit counselling and education process, clients are asked to identify from a list of common reasons for financial distress, the causes of their current financial situation.¹⁰⁷ Linfield suggested that several of the categories need additional in-depth study in order to better understand what clients are indicating, such as overextension of credit and unexpected expenses, as they lack detail; and evaluation of such information should include analysis of the underlying factors for these specific circumstances.¹⁰⁸

Rafael Efrat studied the evolution of bankruptcy stigma through a content analysis of newspaper articles.¹⁰⁹ The study measured evolving public

authority by Congress to impose user fees for electronic access to case information. Access to web based PACER systems generates a .08 USD per page charge, with no billing each year where the cost is lower than ten dollars. There is a cap of 2.40 USD for any document, although it does not apply to name searches, reports that are not case-specific and transcripts of federal court proceedings.

¹⁰² Because PACER database systems are maintained within each court, each jurisdiction will have a different URL, *ibid*.

¹⁰³ Deborah Thorne and Leon Anderson, "Managing the Stigma of Personal Bankruptcy", (2006) 39 SOC. FOCUS 77.

¹⁰⁴ *Ibid.* at 120.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* at 121.

¹⁰⁷ Leslie E. Linfield, "So Who Is Financially Distressed These Days?", (2007) 26-10 ABIJ 12.

¹⁰⁸ *Ibid.*

¹⁰⁹ Rafael Efrat, "The Evolution of Bankruptcy Stigma", (2006) 7 Theoretical Inquiries in Law 365;

perception about bankruptcy by examining the general public's expressed sentiments. 176 newspaper articles published between 1864 and 2002 were examined for content.¹¹⁰ The study chose the popular print media as they function as the general population's "quasi town square", providing a daily chronicle of how social problems are defined and perceived within society. The author chose the New York Times more specifically, as it is among the most widely circulated daily newspapers in the US.¹¹¹ Once articles were collected, four content evaluators coded the articles. A questionnaire was developed to evaluate and assist the content evaluators, who were graduate students, in their assessment of the articles. After reading and independently analyzing each article assigned to him or her from the sample, each content evaluator filled out a questionnaire. The questionnaire required the content evaluator to evaluate the article based on specified criteria. The content evaluators' numerical assessments were averaged for each examined article. An average was then computed for all articles in a given year. The average score for each year between 1864 and 2002 was recorded on an excel spreadsheet and subjected to data mining. The author recognized that the research design had several limitations, including the limited ability of a single newspaper to reflect broad populace attitudes; and the risk of subjectivity notwithstanding the guidance to content evaluators. The study found a noticeable shift in public attitudes beginning in the 1960s towards individuals filing for personal bankruptcy in the US; however, the study did not find that changing public perception necessarily prompted an increase in bankruptcy filings. The study found that changes in gross domestic product, credit card debt, credit card spending, and consumer credit could explain about ninety percent of the variation in bankruptcy filing rates in the database, and the impact of the apparent shift in social perception of bankruptcy in the US had only limited influence, if any, on bankruptcy filing rates.

Golmant and Ulrich studied the degree to which bankruptcy is a function of age.¹¹² The study used "a nationally-representative database of chapter 7 and 13 consumer bankruptcy petitions". The data revealed that bankruptcy filings by Americans aged 55 and older are rising at a faster rate than that of the general population. They argued that while the relationship between age and debt has been documented, the degree to which bankruptcy is a function of age is less well studied. They suggested that debtor-supplied information can be misleading or incomplete where studies are not national and not longitudinal, and that there is a need to avoid issues of non-disclosure and respondent bias. In their view, broad based match of social security numbers to bankruptcy records may yield more reliable data.

Deanne Loonin and Elizabeth Renuart also discuss the growing debt burdens of older consumers and related policy recommendations, but little on

<<http://find.galegroup.com/itx/infomark.do?&contentSet=IAC-Documents&type=retrieve&tabID=T001&prodId=AONE&docId=A149267685&source=gale&userGroupName=tplmain&version=1.0>>.

¹¹⁰ *Ibid.* at 82.

¹¹¹ *Ibid.*, reporting that the New York Times has a diverse readership and national scope, and it is the only mass circulated newspaper that has its content indexed as far back as the mid-nineteenth century.

¹¹² John Golmant and Tom Ulrich, "Aging and Bankruptcy: The Baby Boomers Meet Up at Bankruptcy Court", (2007) 26-4 American Bankruptcy Institute Journal 26-54.

methodology is discussed.¹¹³ They found that elders' financial problems are often compounded by predatory lenders who target the equity in elders' homes by offering loans to pay for long-neglected home repairs, credit card bills, property and municipal taxes, and medical bills. They observe that publicly available data on the incidence of subprime and predatory lending is sparse, although improving because of the *Home Mortgage Disclosure Act (HMDA)*, which now requires many lenders to report certain information about their subprime lending portfolios. Elderly consumers are targets of other fraudulent practices, including telemarketing and sweepstakes schemes.¹¹⁴ Elders constitute a significant portion of credit counseling agency clients, representing a disproportionately large segment of these agencies' clienteles when compared to the general population.¹¹⁵ The authors posit the question of whether the benefits of special protections for vulnerable elders outweigh the loss of autonomy for those who are competent and able to make independent decisions. They conclude that a number of measures are needed, particularly in respect of information outside of the bankruptcy process, and that one mechanism would be to require lenders to report age information under HMDA.¹¹⁶

Katherine Porter and Deborah Thorne have used original, longitudinal data to test the thesis that Chapter 7 rehabilitates debtors for a fresh start in the economy. They found that just one year post-bankruptcy, one in four debtors was struggling to pay routine bills, and one in three debtors reported an overall financial situation similar to or worse than when that debtor filed bankruptcy.¹¹⁷ They conclude that bankruptcy is an incomplete tool to rehabilitate those in financial distress. The data came primarily from extensive telephone interviews with 359 debtors conducted approximately one year after the debtors' bankruptcy filings. They correlated those interviews with the responses from questionnaires the debtors completed near the time of their bankruptcy filings and with their bankruptcy court records. They also compared families who reported financial improvement with those whose situation had remained the same or worsened, analyzing the two groups across dozens of demographic and economic variables. The key trait for 68% of debtors struggling was their lack of adequate steady income.¹¹⁸

The methodology of the Porter and Thorne study included a core sample of 1,250 consumer bankruptcy cases filed in early 2001 in five judicial districts.¹¹⁹

¹¹³ Deanne Loonin and Elizabeth Renuart, "The Middle-Class Crunch: The Life and Debt Cycle: The Growing Debt Burdens of Older Consumers and Related Policy Recommendations", (2007) 44 *Harvard Journal on Legislation* 166- 203.

¹¹⁴ *Ibid.* They also found that traditional elder assistance agencies, such as state agencies and senior centres, rarely offer direct assistance for older consumers with credit card problems.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ Katherine Porter and Dr. Deborah Thorne, "The Failure of Bankruptcy's Fresh Start", (2006) 92 *Cornell Law Review*, 67-128.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* A letter accompanying the questionnaire informed debtors that their participation in the study was voluntary and would not affect their bankruptcy cases. The institutional review boards of Harvard University and the University of Texas approved the study's research protocols with regard to human subjects protections. All researchers who had access to respondents' names or identifying data signed confidentiality agreements. The sample included only debtors who filed Chapter 7 or 13 bankruptcy. Married couples filing jointly completed a single questionnaire. The

A questionnaire was distributed to debtors at the mandatory meetings of creditors, which asked demographic information: age, occupation, and marital status, reasons for seeking bankruptcy relief and the strategies they used to manage their financial problems before bankruptcy. The authors compared with data collected from the corresponding public court records, bankruptcy petition and schedules, including information about the debtors' assets, liabilities, income, and expenses at the time of their bankruptcies. Questionnaire participants were offered 150 USD for 3 follow up telephone interviews; and 630 debtors completed with a subsample of 359 interview participants one year after. Responses to the interviews were coded into a specially designed database.¹²⁰ Most questions were close-ended, and many were designed to explore families' post-bankruptcy financial status. The authors note that debtors who completed the telephone interviews were self-selected, introducing the possibility of respondent bias. They found that interview participants were significantly more likely to be single and white than those who did not complete interviews. Further analysis of the economic variables did not reveal any statistically significant differences between the two groups.

Angela Littwin has observed that the question of whether to reimpose usury restrictions lies at the heart of the debates over consumer-credit regulation.¹²¹ She conducted in-depth interviews, supplemented by documents, with fifty low-income women. She concluded that "usury regulation is an unnecessarily blunt instrument to provide protection for low-income families because low-income families themselves can identify credit-protection devices that would be more nuanced and more useful."¹²² The methodology was to interview fifty low income women, using residence in a public housing project or related government-subsidized housing program as a proxy for low income. 86% of participants had dependents in the home. Littwin utilized a "snowball sample", specifically, once interviewees felt some trust in the interviewer, they recommended friends and acquaintances in similar financial situations.¹²³ While this method does risk selection bias, it does offer an effective means of reaching consumer debtors who may be struggling financially.

Participants in Littwin's study were paid 20 USD for their time. Interviews began with closed-ended questions on demographic data and financial information, with the final section containing open-ended questions. Professor Littwin analysed the interview transcripts using content analysis, a method frequently applied to interview transcript. She concluded that much of the controversy over credit cards has focused on the hypothesized wants and needs of low-income borrowers, but none of the empirical work to date has attempted to weigh the advantages and disadvantages of such regulation from

questionnaires were available in both English and Spanish. In each of the five districts, the authors collected questionnaires from 250 debtors, which created a total core sample of 1,250 bankruptcy cases. To ensure accuracy, they blindly recoded a random sample of 15% of the court records and 10% of the questionnaires to equal 99% accuracy rate.

¹²⁰ *Ibid.*

¹²¹ Angela Littwin, "Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers", (2008), 86 Texas Law Review 451-506.

¹²² *Ibid.*

¹²³ *Ibid.* Littwin describes "snowball sample" as beginning work with one person or a small group of people who are members of the target population; then initial participants then invite other people who meet the study criteria to participate.

the viewpoint of low-income credit-card users.¹²⁴ She reports: "Interviewing was the ideal methodology because the goal was to obtain a rich account of people's experiences with and opinions about credit cards. To gain a textured understanding of participants' opinions, the study needed the opportunity to push participants to make real choices about the trade-offs of increased access to credit cards and not to leave with pat answers, such as 'credit-card companies should lower interest rates and make them universally available'." In addition, Professor Littwin obtained written records of participants' borrowing histories through documents, such as credit-card statements and credit reports, after building trust during the interview to increase the chance that participants would agree to share their records.¹²⁵

In summary, US scholars have been innovative and comprehensive in their methodologies, offering important insights into both research design and execution and the substantive law. Scholars in other jurisdictions are the beneficiaries of experience and insights from the Consumer Bankruptcy Project and related large scale research projects on consumer debt and consumer insolvency.

3. United Kingdom Studies

The UK policy approach to consumer indebtedness is multi-faceted, and now includes bankruptcy, county court administration orders, individual voluntary arrangements (IVAs), informal stays with repayment plans negotiated by Citizens Advice Bureaux or credit counselling agencies. UK regulators have collected data and generated reports, and more recently, scholars have commenced analyzing data on only some of these processes.¹²⁶ To date, there appear to have been no comprehensive longitudinal empirical studies that have examined the benefits and challenges of these various strategies, although, as noted below, the first significant pilot study has been reported on in 2009.

One 1989 survey found that debt in the UK is primarily associated with low income households with children; and that over-indebtedness was largely associated those individuals on social assistance or in low-paying jobs that were often temporary or part-time.¹²⁷ Consumer debtors were unable to meet bills and often subsidized their income through acquisition of more debt.¹²⁸ The study found that while some consumer debtors filed after creditors and debt

¹²⁴ *Ibid.* This study suggests that there is a problem of overconsumption, one of borrowers whose short-term spending exceeds that which they themselves would prefer in the long run.

¹²⁵ *Ibid.*

¹²⁶ See for example, Civil Justice Division and Information Management Division Department of Constitutional Affairs, "Who is Using County Court Administration Orders and Debtor Petitions?" (2003), finding that 75% of users of county court administration orders receive unemployment benefits and 65% are young women; Elaine Kempson & Sharon Collard, "Managing Multiple Debts: Experiences of County Court Administration Orders Among Debtors, Creditors and Advisors" (2004); Department of Constitutional Affairs, "A Choice of Paths: Better Options to Manage Over-indebtedness and Multiple Debt" (2004) (Consultation paper 23/04), <http://www.dca.gov.uk/consult/debt/debt.pdf>.

¹²⁷ R. Berthoud and E. Kempson, *Credit and Debt: The PSI Study* (London: Policy Studies Institute, 1992).

¹²⁸ *Ibid.*

collection agencies sought to enforce claims, few bankrupts had been subject of legal debt enforcement procedures by creditors prior to filing.¹²⁹

Michael Adler previously observed that considerably more investigation was required in respect of whether a combination of economic and social measures could be used to predict personal bankruptcy rates, calling for a multivariate analysis.¹³⁰ He argued that the relationship between social class and insolvency was significant, and a better understanding of that relationship was an essential precondition for designing reform of the insolvency law system.¹³¹

The greatest interest in empirical analysis in the UK has followed on the heels of 2004 insolvency law reforms, where bankruptcy discharge was made more available to consumer debtors. Since the amendments, there has been a significant increase in the number of individual bankruptcies, although UK rate remains lower than the US or Canada. One study suggests that the increase is due to higher levels of unsecured debt among consumer debtors, making them more vulnerable to income shocks.¹³² The government's policy is that fundamental requirements for minimizing problem debt are a stable, well-managed economy and an efficient, well-regulated market for personal credit in which lenders lend responsibly and borrowers borrow responsibly, with access to appropriate information and advice.¹³³ In this respect, the current policy focuses more on individual control of debt than factors beyond the control of consumer debtors, such as access to employment and housing. Debt advice agencies have a significant role in the UK, both publicly and privately funded services. The Citizens Advice Bureau is an independent network of 500 free advice centres, offering legal advice on consumer and debt problems for many lower income consumers.¹³⁴

The Citizens Advice Bureau has conducted two studies of its client clients in the past six years, the first in 2003.¹³⁵ Working in partnership with the Insolvency Service, it asked a 10% random sample of Citizens Advice Bureaux to take part in the *Financial Statements Survey (FSS)* in order for the Insolvency Service to assess the possible take-up and cost of a new insolvency remedy,

¹²⁹ *Ibid.*

¹³⁰ Michael Adler, "Reactions to Empirical Studies" (1999), 37 Osgood Hall 127 at 130.

¹³¹ *Ibid.* at 134.

¹³² Bank of England, Financial Stability Review 19 (2005), <http://www.bankofengland.co.uk/publications/fsr/2005/themesandissues0512.pdf>.

¹³³ Department of Business Enterprise and Regulatory Reform, *Tackling Over-Indebtedness, 2007 Annual Report*, <http://www.berr.gov.uk/files/file42700.pdf> at 5.

¹³⁴ Sue Edwards, Citizens Advice, *In too deep, CAB clients' experience of debt*, (2003), http://www.citizensadvice.org.uk/index/campaigns/policy_campaign_publications/evidence_reports/er_consumeranddebt/in-too-deep. The government provides two thirds of its funding; the rest is through local authorities, charitable organizations and the Legal Services Commission. The Department of Business Enterprise and Regulatory Reform has recently observed that it is committed to helping those most vulnerable to the causes and consequences of problem debt, using the £130 million Financial Inclusion Fund for 2008-11 to support the continued provision of free debt advice for financially excluded people, and widen access to affordable credit; Department of Business Enterprise and Regulatory Reform, *Tackling Over-Indebtedness, 2007 Annual Report*, <http://www.berr.gov.uk/files/file42700.pdf>.

¹³⁵ Sue Edwards, Citizens Advice, *In too deep, ibid.*

the debt relief order, targeted at debtors with low incomes and assets.¹³⁶ The second study in 2006 includes data on 567 debt clients from 61 bureaux.¹³⁷ Each participating bureau was asked to send a copy of every financial statement drafted for a new debt client in February 2004.¹³⁸ For each financial statement, an additional top sheet of information was included, profiling the client's socio-economic situation. While the information was collected from front-line advice providers, the methodology makes no mention of surveying the clients themselves. The study found that two in five households depended entirely on benefit income; that average total household debt was £13,153, a 30% increase between 2003 and 2006; that on average, debts were 17.5 times the client's total monthly household income, a significant increase from 2001; that half of the people surveyed had less than £20 per month to offer to all of their creditors, and over half of those had nothing to offer creditors at all; that on average it would take debtors who were able to make a repayment to their non-priority creditors 77 years to repay the debts at the amount offered; that only 10% of debtors had a positive balance in a bank or building society account and the average amount held was only £404; and that 23% of surveyed debt clients had a disability or long-term illness.¹³⁹ The results indicate that in the UK, consumer debt is rapidly deepening.

Professor Ramsay has suggested that there should be political economy analysis that addresses the role of national and international interest groups in understanding different national responses to over-indebtedness.¹⁴⁰ He examined reforms to consumer bankruptcy and responses to over-indebtedness in the UK through this political economy lens, concluding that competition among professional groups, the role and interests of the national Insolvency Service, and the current political ideology of government in consumer policy will influence consumer insolvency policy, rather than a consumer debtor focused approach.¹⁴¹ Ramsay suggests that the reform of UK consumer bankruptcy is intended to promote responsible supply and demand sides of the credit market, arguing the EU directives and regulations have not influenced the UK response to consumer over-indebtedness and that UK scholars need to contribute more to consumer bankruptcy policy making.¹⁴² Ramsay suggests that the absence of systematic empirical knowledge of the consumer bankruptcy system and the experience of consumer bankrupts makes it difficult to challenge the knowledge of insolvency professionals in policy choices.¹⁴³ Ramsay would undertake more systems analysis, observing that "comparative studies of consumer bankruptcy and debt adjustment suggest the falsifiable hypothesis that as consumer credit develops in a country, some form of safety valve for individuals who fail will also develop,

¹³⁶ Jane Phipps and Francesca Hopwood Road, Citizens Advice Bureau, *Deeper in Debt* (2006); http://www.citizensadvice.org.uk/index/campaigns/policy_campaign_publications/evidence_reports/er_consumerandebt/bf_consumer_deeper_in_debt.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.* at 3.

¹³⁹ *Ibid.*

¹⁴⁰ Iain D.C. Ramsay, "Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales; Theoretical Inquiries in Law", 2006, <http://ssrn.com/abstract=900419>.

¹⁴¹ *Ibid.* at 32.

¹⁴² *Ibid.* at 33.

concluding that the timing of this development could not be predicted with certainty.”¹⁴³

Ramsay suggested that recent legislative reform in the UK was driven by a belief that a reduction in the stigma of bankruptcy and fear of failure would promote “responsible risk taking” and entrepreneurialism.¹⁴⁴ He notes that the current approach “envisages a consumer credit market of responsible lenders and borrowers that may be achieved through a variety of regulatory instruments. These range from better credit scoring and new consumer credit rights, to self-regulation by the British Bankers Association, under its Banking Code, of ‘health warnings’ about the dangers of regularly paying only the minimum balance on a credit card”.¹⁴⁵ He recommends considerably more empirical research to examine trends and underlying policy values.

In early 2009, John Tribe published one of the first empirical studies in the UK. Tribe conducted a pilot questionnaire based study, involving bankruptcy courts in England and Wales.¹⁴⁶ The study was aimed at addressing the lack of empirical studies that directly seek the views of consumer debtors.¹⁴⁷ Debtors were asked about the effects of bankruptcy on the individual; the type of debtors that access bankruptcy; whether the high cost of entering the bankruptcy system was prohibitive; whether other non-bankruptcy procedures are more prevalent; and whether insolvent consumers lack knowledge in relation to exit routes from over-indebtedness.¹⁴⁸ The methodology of the study included selection of six courts in the UK, chosen in terms of different geographical location and user numbers.¹⁴⁹ Different versions of the questionnaire were drafted to reflect whether recipients were bankrupts or practitioners. Questions were reviewed in advance by the Insolvency Service, academics and practitioners, and the questions were broad in nature to elicit as much information as possible.¹⁵⁰ The survey was designed to encompass questions relating to specific elements of the bankruptcy process and phenomenological data relating to the bankrupt’s own experience, encompassing both closed and open-ended questions.¹⁵¹ Names and particulars of bankrupts surveyed were drawn from the Insolvency Service’s *Register of Personal Insolvents*.

The pilot study had a very low response rate from professionals, but an 11.5% response rate from bankrupts.¹⁵² The study experimented with three different

¹⁴³ *Ibid.* at 33. His view is that “A central distinction should be drawn between countries in which a public agency has a significant role and those in which much work is delegated to professionals”.

¹⁴⁴ Ramsay, *supra*. See also The Insolvency Service, *Bankruptcy: A Fresh Start*, (2000); The Insolvency Service, *Insolvency—A Second Chance*, (2001), Cm. 5234, para. 1.8, available at <http://www.archive.official-documents.co.uk/document/cm52/5234/5234.htm> (July 2001).

¹⁴⁵ Ramsay, *ibid.*

¹⁴⁶ John P. Tribe, “Bankruptcy Courts Survey 2005 – A Pilot Study”, (2006), Kingston Business School Occasional Paper No. 59, 1-222.

¹⁴⁷ *Ibid.* at 11-12. Tribe observes that an exception to lack of empirical work are annual surveys conducted by R3, the British Association of business recovery professionals since 1991, but the surveys seek the views of professionals, not debtors.

¹⁴⁸ *Ibid.* at 14-15.

¹⁴⁹ *Ibid.* at 16.

¹⁵⁰ *Ibid.* at 19.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.* at 20. 99 surveys were sent out to professionals and only 6 completed.

questionnaire methods in different districts, all sent with self-addressed pre-paid return envelopes. The first was a traditional questionnaire and university cover letter; the second was a shorter “initial questionnaire” with a question asking whether a longer questionnaire could be sent to them, with a subsequent longer questionnaire sent to those who agreed; the third was a standard version questionnaire, but recipients were advised that successful completion and return of it would lead to the inclusion in a draw to win £ 50.00 worth of vouchers for WH Smiths or Boots.¹⁵³ There was a mixture of positive and negative questions, multiple choice questions, classification questions, “sensitive” questions, legal and non-legal questions.¹⁵⁴ The responses were inputted in a Microsoft Excel program and later in the Statistical Package for the Social Sciences, and examined for response bias; Tribe concluding that the data was more reliable than past second source anecdotal evidence, and that some tentative conclusions could be drawn from the pilot survey.¹⁵⁵

The Tribe study found that the principal cause of bankruptcy was credit misuse, followed by small business failure.¹⁵⁶ The majority of bankrupts were male, and there was no definitive age range for the typical bankrupt. The study also found that debtors presented the majority of bankruptcy petitions; bankruptcy appears not to affect employment; the vast majority of bankrupts were not homeowners prior to bankruptcy; and debtors’ knowledge of the *Enterprise Act 2002* provisions and their effects was low. The majority of bankrupts surveyed felt morally at fault for their debt problems; and, significantly, a large majority of debtors did not know what size of indebtedness they were being released from.¹⁵⁷ The study also revealed that there are implications for credit access post-discharge. Bankrupts experienced difficulty obtaining bank accounts post-discharge; in turn, creating problems for access to credit. It found that informal voluntary arrangements and individual voluntary arrangements were a close second choice for over-indebted debtors.¹⁵⁸ Consumer debtors have usually explored other methods of dealing with their financial distress before pursuing bankruptcy, primarily through the voluntary advice sector and word of mouth. Stigma and embarrassment remain key features of bankruptcy in the UK. Generally, however, the survey revealed that the bankrupts thought the system was efficient, that advice from the Citizens Advice Bureaux and trustees in bankruptcy was good, that dealings with the official receiver were positive, and that the one year discharge period was appropriate.

Subsequent to Tribe’s pilot study, he is conducting a study in 2009 co-funded by the national Insolvency Service titled *English and Welsh Personal Insolvency Law: Debtor Advice, Debtor Education and the Credit Environment*, labelled the Personal Insolvency Project (PIP) for short. Tribe has outlined the

¹⁵³ *Ibid.* Tribe reports that ethical validity was considered, met with university ethical research guidelines. The fourth method was that questionnaires were to be included in the official receiver’s correspondence with the various stakeholders and include a university cover letter; however, this option did not occur as the official receiver’s office had too great a workload.

¹⁵⁴ *Ibid.* The cover letter explained the purpose, motivation and intended use of results of the study, at 24.

¹⁵⁵ *Ibid.* at 24, 25, 188.

¹⁵⁶ *Ibid.* at 189.

¹⁵⁷ *Ibid.* at 189-190.

¹⁵⁸ *Ibid.* at 190.

proposed methodology.¹⁵⁹ PIP involves an expanded survey of more bankrupts in an expanded sample of bankruptcy courts. In addition to consumer bankruptcy, this time the study captures individual voluntary arrangements (IVAs), debt management agreements provided by both licensed and unlicensed debt management advisors (DMA), and wider issues relating to debtor advice and education for debtors. 955 bankrupts reported dissatisfaction with options explained to them in respect of their over-indebtedness, indicating that the level and quality of advice in relation to procedure choice and procedure outcome is lacking for consumer debtors. Tribe reports that this dissatisfaction lies primarily with DMAs, and appropriateness of IVA procedure advice as compared to alternative and sometimes more suitable procedures.¹⁶⁰

Tribe's current empirical project is concentrating on an analysis of services provided by both licensed and unlicensed DMA. Tribe observes that the work of the Citizens Advice Bureau and more traditional insolvency practitioners fall outside the parameters of this research. Research questions include: to what extent do IVA and DMA firms comply with the pertinent Statements of Insolvency Practice; how appropriate is the procedure advice given by IVA firms and what benchmarks exist to test appropriateness; are IVA firms proposing IVAs when a better alternative would be bankruptcy due to the individual's financial state and are there appropriate extant benchmarks to test this advice; and are IVA firms placing their own financial interest before those of the debtor, giving incorrect advice to ensure nominee fees are obtained? The study will also examine the role insolvency practitioners play in IVA firms; whether they supervise their staff adequately; whether insolvency practitioners receive exception reports; how are IVA firms remunerated for their IVA nominee and supervisor work; whether it is front loaded and any consequences of this structure for the creditors in terms of realised estates; what are the proposed outcomes of IVAs and the actual outcomes of IVAs as managed by IVA firms; what is the failure rate of IVAs; how will proposed reforms affect the IVA firms; how successful are the IVA schemes that they administer and how do the resolutions compare to alternative procedures such as bankruptcy with income payments order recovery and expected outcome recovery?

The methodology includes a researcher spending at least three working months within as many of the IVA firms as possible to ascertain what exactly is occurring. To date, 89 firms have been contacted and 26 have agreed. One issue is likely access to data and to the firms' internal guidance mechanisms for non-licensed firms. Tribe observes that IVA firms perform a service regulated ultimately by the Insolvency Service, with all the corollary issues relating to statutory compliance, and thus access should not be a problem as there should be nothing to hide. The study will examine DMA and IVA firm advice, payment, remuneration and other procedures, hoping to shed light on practices not envisaged by the legislature when it enacted the IVA provisions. Tribe reports that a nominal shareholding is being taken in each of the AIM-listed IVA firms to help facilitate access to pertinent information, through the relevant *Companies Act 1985* provisions.

Tribe's previous pilot study had found that one solution to the rise in consumer debt could be to facilitate a program of debtor education or compulsory

¹⁵⁹ John P. Tribe, "Personal Insolvency Law: Debtor Education, Debtor Advice and the Credit Environment: Part 1" (January 16, 2009). *Insolvency Intelligence*, 20(2), 23-28; SSRN: <http://ssrn.com/abstract>.

¹⁶⁰ *Ibid.*

financial counselling, undertaken both before problems arise in terms of personal over-indebtedness and post-bankruptcy in order to help reduce the risk of a second bankruptcy. New pilot programs of this nature are planned as part of Tribe's ongoing research. Tribe observes that credit responsibility should be taught at a much earlier stage than at the onset of insolvency or immediately after the consequences have come to fruition.

Tribe suggests that credit providers could be given a duty to supply to potential debtors a "Credit Responsibility Pack" that outlines the problems of personal over-indebtedness and the possible outcomes of default.¹⁶¹ Bankrupt debtors, on discharge, could also be given the option of attending a "Credit Responsibility Day" at which they are given education and advice to assist in re-entering the credit market. Tribe observes that a number of free three-hour personal financial management workshops are being held at Kingston University for debtors who have been declared bankrupt in the Croydon and Kingston County Courts, modelled after those workshops held by the American Coalition for Consumer Bankruptcy Debtor Education.¹⁶² The study will examine the efficacy of both pre- and post-bankruptcy petition education to determine if educational initiatives beyond those currently in place would encourage responsible credit usage.¹⁶³

Part three of the PIP research will involve an investigation of bank lending practices to consumer debtors, including lending decision processes in various banks, credit check usage, behavioural scoring and other issues related to the bank's decision to extend credit to individuals; training, guidance and targets employees are expected to meet; and the extent to which bank remuneration is linked to "sales" targets. A researcher will spend at least two months visiting high street lending institutions' regional loan centres to investigate these questions, interviewing bank staff in relation to their experience of the lending process and its impact on personal over-indebtedness.¹⁶⁴

In another published paper on the pilot study, Professor Tribe, relying on the work of Professor Jacob Ziegel, posits the question of whether credit counselling should be viewed as a debtor economic protection measure, in terms of assisting debtors to understand the changing nature and problems associated with credit card debt.¹⁶⁵ Tribe will study the effects of the recently enacted debt relief order (DRO), which has as its objective to offer a remedy of discharge after one year to individuals who have a low level of debt, no assets over and above a nominal amount, and no surplus income with which to come

¹⁶¹ *Ibid.* He suggests that if the debtor does not read and sign the same and submit to a central register, then their automatic discharge period could be delayed to take into account their earlier irresponsible approach to credit usage.

¹⁶² *Ibid.*, referring to three-hour personal financial management courses provided to free bankrupts in the Eastern and Southern Districts of New York. It is also proposed to hold three Credit Responsibility Days at Kingston University for undischarged and discharged bankrupts.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.* at 10.

¹⁶⁵ John P. Tribe, "Personal Insolvency Law: Debtor Education, Debtor Advice and the Credit Environment - Part 2" (January 15, 2009). *Insolvency Intelligence*, Vol. 21, No. 7, pp. 97-102, 2008. Available at SSRN: <http://ssrn.com/abstract=1328433>. He notes that Professor Ziegel has also posited whether insolvency law should be viewed as a form of social welfare, which takes into account circumstances beyond the control of a debtor.

to an arrangement with their creditors.¹⁶⁶ The DRO scheme is meant to be a less costly and simplified non-court based procedure, open to those who cannot make payments to their creditors. Tribe observes that one barrier may be the up-front entry fee, but notes that the government has proposed that the sum, which remains unspecified, would be substantially lower than that required for bankruptcy. He also observes that the use of Citizens Advice Bureaux to assess whether debtors are suitable for a DRO will assist controlling costs.¹⁶⁷ Tribe observes that the PIP is restricted in terms of its research aims, in part because budgetary constraints preclude a more lengthy examination of the topics. He suggests that other areas ripe for research include: possibility of an ombudsman as part of a complaints system; the efficacy of bankruptcy restriction order; and greater interdisciplinary research on personal insolvency in the UK, allowing for collaboration between legal, accounting, banking and education scholars.¹⁶⁸

Adrian Walters has recently examined individual voluntary arrangements (IVA) as an alternative to bankruptcy under the UK *Insolvency Act 1986*.¹⁶⁹ IVAs are regulated agreements between debtors and creditors facilitated by a licensed insolvency practitioner. Walters observes that while consumers have used both these debt relief mechanisms in increasing numbers in recent years, IVAs have grown faster than bankruptcies from 2003 to 2006, but stalled in 2007 to 2008.¹⁷⁰ IVAs usually involve a five-year payment plan. Professor Walters posits that the increase in IVAs can be traced to supply side changes in the market for debt resolution and the emergence of volume providers that he observes are commonly referred to as “IVA factories”; as well as a “democratization of debt”, whereby mainstream credit has become available to lower income social groups to whom it was not traditionally available.¹⁷¹

Professor Walters also suggests that there has been a sustained backlash against the procedure, instigated by institutional creditors demanding higher recoveries, accounting for the subsequent decline in approvals.¹⁷² He recommends more research on the increasing complex UK debt resolution market. He notes that basic details of every new bankruptcy and IVA are required to be entered on a statutory registry, these official data revealing the extent of credit.¹⁷³ Professor Walters observes that IVA debtors avoid the greater publicity and perceived stigma associated with bankruptcy. The fact that a debtor has entered into an IVA is, like a bankruptcy order, a matter of public record in that it must be entered on the statutory insolvency register maintained by the Insolvency Service. It will therefore be picked up by the

¹⁶⁶ Tribe reports that the criteria for a DRO are proposed as: total liabilities of no more than £15,000; that the debtor has no more than £50 in surplus income per month; and that the debtor should have assets of less than £300. *Ibid.* at 100.

¹⁶⁷ Tribe reports that if the debtor was deemed suitable he or she would then apply to the official receiver for relief, a process that could take place online. The advice provider, such as the CAB, would help the debtor complete the appropriate forms before submission to the official receiver.

¹⁶⁸ *Ibid.* at 101.

¹⁶⁹ Adrian Walters, “Individual Voluntary Arrangements: A ‘Fresh Start’ for Salaried Consumer Debtors in England and Wales?” (September 6, 2008). (Forthcoming, London: International Insolvency Review, 2009). Available at SSRN: <http://ssrn.com/abstract=1264406>.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ *Ibid.*, citing Insolvency Rules 1986 SI 1986/1925 (‘IR 1986’) rr 6A.1-6A.5.

credit reference agencies. There is, however, no requirement for IVAs to be gazetted or advertised in the press.¹⁷⁴ Citing Tribe's recent survey, Walters notes that over 70 per cent of a sample of debtors gave answers that indicated a continuing perception of stigma attached to bankruptcy.¹⁷⁵

In summary, UK scholars are currently at the front end of various research initiatives that will elicit more comprehensive and insightful information, allowing for the first comprehensive empirical work on consumer insolvency in that jurisdiction.

4. Continental Europe

Once one moves beyond the US, UK and Canada, there is a serious lacuna in consumer debtor empirical research. In some cases, such as Italy, it is because there is not yet a consumer insolvency regime and debtors are left to the vagaries of creditor enforcement conduct. There was little information that this study could find on empirical scholarship in the EU or other countries in continental Europe, in either English or French. In part, this lack of research may be due to the recent nature of consumer debt forgiveness programs. France introduced a modest form of debt relief in 1989 as part of consumer protection, part of a package aimed at preventing consumer over-indebtedness.¹⁷⁶ Other jurisdictions have enacted consumer insolvency schemes only in the past decade.

Johanna Niemi-Kiesiläinen has analysed debt-adjustment procedures in Europe, suggesting that the social market model of debt-adjustment in Scandinavian and German systems is a function of their overall legal and social system and reflects a different conceptualization of the rights and responsibilities of debtors, creditors and the state.¹⁷⁷ In Scandinavia, debt relief is tailored to unforeseen financial difficulties that challenge the limits of the welfare state's ability to address these problems, such as long term unemployment or illness, not mismanagement of credit or over-spending, where consumer debtors can face difficulty in obtaining debt relief.¹⁷⁸ In Germany, reform offered discharge to a debtor who entered a repayment plan.

In Finland, a national survey on households has for many years now included a question on over-indebtedness, framed as "do you feel that the debt load of your household exceeds your ability to meet your obligations".¹⁷⁹ Scholars have considered that this question gives, over time, information on the changes in the nature of debt problems.¹⁸⁰

¹⁷⁴ *Ibid.* at 31.

¹⁷⁵ *Ibid.* at 31, citing J. Tribe, 'Centre for Insolvency Law and Policy: Bankruptcy Courts Survey 2005 – A Pilot Study' (2006); <<http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/personaldocs/BankruptcyCourtsSurvey.pdf>> 104-107, and National Insolvency Service, "Attitudes to Bankruptcy", *rmreport.doc*>.2005.

¹⁷⁶ Ramsay, *supra*, note 13.

¹⁷⁷ Johanna Niemi-Kiesiläinen, "Constructions of Debtors and Creditors in Consumer Bankruptcy", J. Niemi-Kiesiläinen, I. Ramsay and W. Whitford, (eds), *Consumer Bankruptcy in Global Perspective* (Hart Publishing, Oxford 2003).

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

In France, interest rate ceilings and negative credit reporting may contribute to substantially lower levels of access to credit in France than in other EU countries.¹⁸¹ Ramsay observes that in 2004, the Bank of France reported that individuals using the *commissions du surendettement* were between ages 35-54, often workers with a monthly salary of less than €1500; one third were unemployed; debtors were renters, not owners; and that limited resources combined with a change of circumstance frequently caused financial distress rather than excessive indebtedness.¹⁸² More generally, Curran has suggested that civil law systems such as France may have a higher concern with the morality of contract performance, in turn influencing approaches to indebtedness.¹⁸³ Access to debt forgiveness through discharge after twelve months in France is premised on the notion that an individual be irredeemably compromised before being permitted to access the new special procedure.¹⁸⁴ None of the studies we found in France appear to have directly surveyed consumer debtors or insolvency professionals.

Jason Kilborn has written on the constant state of flux of consumer insolvency law in Europe, and the move in recent years towards a codified consumer insolvency regime.¹⁸⁵ However, his work, to date, has not involved direct contact with consumer debtors or empirical study of data generated by the particular countries. Kilborn has explored the connection between social welfare reform and the adoption of consumer debt relief law in Europe, observing that health care expenses and unemployment are significant contributors to over-indebtedness in Europe.¹⁸⁶ He critically analyzes the suggestion that unraveling social safety nets are a major contributing factor in the adoption of consumer debt relief laws in Europe in the 1990s by tracking the recent scaling back of social assistance programs in Sweden, Germany, and France, and comparing that movement with the adoption of consumer insolvency regimes in those countries, finding the temporal correlation weak. He concludes that rather than an eroding social safety net causing the adoption

¹⁸¹ N° 2034 Assemblée Nationale, Douzième Legislature, Rapport fait au nom de la Commission des Affaires Économiques, de l'Environnement et du Territoire sur la Proposition de Loi (n° 29) de Mm. Jean-Christophe Lagarde et Hervé Morin, tendant à prévenir le surendettement; <http://www.assemblee-nationale.fr/12/rapports/r2034.asp>.

¹⁸² Ramsay, *supra*, citing Enquête typologique 2004 sur le surendettement, http://www.banquefrance.fr/fr/publications/telechar/autres_telechar/enquete_typo2004_surendettement.pdf (2005).

¹⁸³ Vivienne Curran, "Cultural Immersion, Differences and Categories in US Comparative Law", (1998) 46 Am. J. Comp. L. 43.

¹⁸⁴ The French Code de la Consommation, <http://www.assemblee-nationale.fr/12/rapports/r2034.asp>. Nathalie Côte, « Le Nouveau Dispositif de Traitement du Surendettement des Particuliers. » Titre III de la loi n° 2003-710 du 1er août 2003, (2003) 46 JCP G Semaine Juridique.

¹⁸⁵ Jason Kilborn, "Two Decades, Three Key Questions, and Evolving Answers in European Consumer Insolvency Law: Responsibility, Discretion, and Sacrifice", (2007), SSRN: <http://ssrn.com/abstract=1080252>; Jason J. Kilborn, "The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the US", (2006) Northwestern Journal of International Law & Business, Vol. 24, p. 257; SSRN: <http://ssrn.com/abstract=452620>; Jason Kilborn, "Out with the New, In with the Old: As Sweden Aggressively Streamlines Its Consumer Bankruptcy System, Have US Reformers Fallen Off the Learning Curve?", (2007) 80 Am. Bankr. L.J. 435.

¹⁸⁶ Jason J. Kilborn, "Comparative Cause and Effect: Consumer Insolvency and the Eroding Social Safety Net", (2008) 14 Columbia Journal of European Law 3, at SSRN: <http://ssrn.com/abstract=926203>.

of consumer bankruptcy law, other powerful variables seem to have driven these reform processes.

5. Australian Empirical Research on Consumer Bankruptcy

A canvass of the Australian insolvency literature did not reveal any recent empirical studies in Australia. The most significant research undertaken to date was by Professor Martin Ryan, from the social work discipline. Ryan examined the post-bankruptcy experiences of consumer debtors.¹⁸⁷ The aim of his empirical study was to examine the perceptions and experiences of a sample of undischarged consumer voluntary bankrupts in Melbourne, Australia. Ryan sought to provide a demographic and social profile, to identify causes of insolvency, to examine the role of creditor harassment in the decision to file, and to explore the experience of bankruptcy from the perspective of the bankrupts themselves.¹⁸⁸

Ryan's methodology included both a comparative literature search and interviews. Letters requesting an interview were sent to 242 bankrupts, the sample drawn from those that filed in Melbourne in 1986-1987, using a stratified random sample of the total number of petitions filed. The goal was to interview each bankrupt twelve months after he or she had petitioned for bankruptcy, but some interviews took up to 17 months to complete. Follow up letters were sent to those bankrupts that had not already moved. Further follow-up was by telephone or in person, but care was taken not to disclose to anyone else in the household that the individual was bankrupt, for confidentiality reasons.¹⁸⁹ Interview pre-tests were conducted on five bankrupts, and then interview questions adjusted based on that sample experience. 76 interviews of 1.5 to 2 hours were completed. The interviews included both close-ended and open-ended questions. Of the 76 bankrupts interviewed, only three denied researchers access to their official receiver's file, which contained all the financial and other statutory declarations. Thus the interview information was supplemented by the official declarations in the file, including the amount and type of debt and reasons for insolvency.¹⁹⁰

The second stage of Ryan's research was to interview personnel involved in the bankruptcy process, including solicitors, credit counsellors and registrar staff who had direct involvement with consumer debtors. The interviews were aimed at providing a counter-balance to the bankrupts' views.

Professor Ryan concluded that consumer bankrupts at that time were likely to be relatively young, married, unemployed and on social assistance. Ryan observed that while the debt profile matched many US studies, in his cohort, a distinguishing feature was the prevalence of unemployment, as opposed to low paying employment. The education level of the Australian bankrupts was limited and average income was 12,000 AUD or less. Almost all were renters rather than home owners.¹⁹¹ At the time of the interviews, 1987, bankrupts were more likely to have store credit and finance company loans than credit card debt. The study found that income support was too limited for these individuals, who then turned to credit for basic living requirements, eventually

¹⁸⁷ Martin Ryan, *The Last Resort: A Study of Consumer Bankrupts* (Ashgate, 1995).

¹⁸⁸ *Ibid.* at 77.

¹⁸⁹ *Ibid.* at 81.

¹⁹⁰ *Ibid.* at 85.

¹⁹¹ *Ibid.* at 209.

exacerbating their financial distress. Ryan observed that most debtors became insolvent because of short to medium term effects of an economic shock, such as job loss or family health reasons, rather than misuse of credit, contrasting the results with the early Canadian study by Brighton and Connidis, discussed above, which had found money mismanagement and excessive credit as the primary cause.¹⁹² Ryan found that in a substantial number of cases, creditor harassment was cited as a key reason for the timing of filing. Most bankrupts reported that they had struggled with their financial distress for up to two years before they petitioned for bankruptcy.¹⁹³ The study made a series of policy recommendations, including the need for accessible alternatives to bankruptcy, such as agreements with creditors, protection against creditor harassment, and post-bankruptcy supports.¹⁹⁴

Ralston, Mason and Kumar undertook a macroeconomic analysis of consumer bankruptcy in Australia in 2001.¹⁹⁵ Their study used a multivariate regression model, specifying variables such as unemployment, interest rates, household indebtedness, average period out of work, and gambling. They relied on information filed in proceedings, as well as data from the Australian Bureau of Statistics, the Reserve Bank of Australia, the Tasmanian Gaming Commission, and Ryan's empirical work.¹⁹⁶ The authors found a positive relationship between unemployment and bankruptcy, yet there was little correlation with length of time without a job, concluding that the relationship between unemployment and bankruptcy was complex.¹⁹⁷ The study also found a high correlation between bankruptcy and gambling, suggesting that existing legislation, rather than deterring gambling, may only serve to have debtors fail to disclose such behaviour. The study concluded that the rate of bankruptcy in Australia would increase with increases in unemployment, interest rates and gambling expenditure, and that the latter variable had been under-recognized in Australian bankruptcy law.¹⁹⁸

One consumer credit study examined debt agreements that were introduced under Part IX of the Australia *Bankruptcy Act* in 1996 as an alternative to bankruptcy for low income debtors with few assets. Under such agreements, debtors can make repayment proposals to creditors.¹⁹⁹ The project included review of a number of case studies from financial counsellors and legal advice services, and discussion of public data on debt agreements. Little of the methodology is described, but the study notes that the source of case studies was experiences of callers to telephone advice services for debtors, financial counsellors, and in-depth interviews conducted with twelve debtors who had originally contacted financial counsellors or the Credit Helpline.²⁰⁰ The study found inadequate information given to debtors prior to signing a proposal, including the effect on their credit rating. There was a lack of information

¹⁹² *Ibid.* at 210.

¹⁹³ *Ibid.* at 214-215.

¹⁹⁴ *Ibid.* at 259-261.

¹⁹⁵ Deborah Ralston, Rosalind Mason and Jayendra Kumar, "Causes of Consumer Bankruptcy in Australia: A Macroeconomic Analysis", Working Paper 01/1, Volume 4, University of the Sunshine Coast Faculty of Business Working Paper Series, 2001.

¹⁹⁶ *Ibid.* at 12.

¹⁹⁷ *Ibid.* at 15.

¹⁹⁸ *Ibid.* at 16.

¹⁹⁹ Consumer Credit Legal Service Inc. and Eastern Access Community Health, *Debt Agreements: Remedy or Racket?* November 2005; <http://www.consumeraction.org.au/downloads/DL55.pdf>.

²⁰⁰ *Ibid.* at 5, 49.

provided to debtors about other possible options to resolve their financial distress; and there were issues in respect of training of some administrators and fees charged. The study called for reforms to ensure an effective alternative to bankruptcy for low income debtors.

In summary, other than a few studies, there has not been a strong history of empirical research in the consumer insolvency area in Australia.

Overall, the consumer insolvency literature identifies a number of important challenges to research into consumer insolvency, which helps inform some suggestions in Part V. We also examined studies on empirical research of direct and vulnerable populations in other contexts. Much written commentary explores the ethical issues associated with data collection. Although the studies offered some insights, they were, for the most part, medically related, raising different kinds of ethical questions. However, the studies do raise some important factors to consider. First, it is important that research questions be clearly identified, so that the methodology selected is appropriate. There is a need to be very clear in respect of the methodology and its limitations. Where there are multiple scholars collecting or inputting data, there must be a mechanism for consistency in framing or reporting the data. One question that researchers should ask themselves is whether the vulnerable population needs to be accessed in order to find data that will create new insights into the research.²⁰¹ Do law and ethics standards protect the population sought to be studied, including the collection of data, its storage and retrieval, its use only for those purposes originally intended or approved, and disposal at an appropriate future date? Another factor is the capacity of ethics reviews boards to assess the risks to the particular population. Finally, research should be designed with sensitivity to the particular power or other relationship between the interviewer and interviewee.

The next part supplements the literature review with the surveys that were conducted with scholars, trustees in bankruptcy and credit counsellors.

IV. Survey of Scholars and Insolvency Professionals

In total, 76 people were surveyed, as discussed in the methodology in Part II. Recall that the legal scholars are from six jurisdictions and the trustees and credit counsellors only from Canada. The responses from the scholars were remarkably consistent across multiple jurisdictions. The responses of insolvency and credit professionals were thoughtful, but more varied in their viewpoints.

1. Methodologies for Collecting Data on Consumer Debtors

Both qualitative and quantitative data are needed in respect of research on over-indebtedness. All of the scholars interviewed observed that the research techniques must be carefully selected based on what is appropriate given the research hypotheses and questions posed. Selection of the data source depends on the research question. For example, one scholar observed that a

²⁰¹ See for example, Scott Burris, Lance Gable, Lesley Stone and Zita Lazzarini, “The Role of State Law in Protecting Human Subjects of Public Health Research and Practice”, (2003) 31 J.L., Med & Ethics 654 at 655.

sample of court files may best ascertain what kind of debtors need and seek relief, the reasons relief is sought, and type and quantum of debt; whereas interviews may be the best method for ascertaining why consumer debtors do not file for consumer bankruptcy, the length of time they struggle with over-indebtedness, and how they survive when their wages are garnished.

In the US, the principal method for collecting and analyzing data has been court records, gathering questionnaires at the meeting with the bankruptcy trustee, telephone interviews with debtors; and interviews with judges and consumer lawyers. Many US scholars access public databases and scholarly empirical papers because they do not have the resources to gather the empirical data themselves. It is evident that the major empirical work of Professors Sullivan, Warren and Westbrook and their colleagues has had a major influence on bankruptcy scholarship and policy development in the US and internationally as it offers one of the most comprehensive longitudinal data set in the world.

Court record extraction in the US is viewed as particularly valuable as a starting place for empirical research on consumer debtors, as court records on consumer bankrupts are accessible and contain valuable information. One scholar observed that they are completed under penalty of perjury and there is no refusal right, so they are viewed as relatively accurate, although not as extensive as they would like. Scholars have also utilized summary statistics about filing rates in different areas of the country. Several US scholars noted that in the past, debtors were solicited to fill out surveys by having research assistants or trustees approach them at the time of their filing, or at the court house door with the cooperation of bankruptcy attorneys. The large statistical studies have all moved to comprehensive surveys and interviews to supplement court data. The surveys have taken the form of written questionnaires mailed or available on the internet. In the third and fourth CBP studies, discussed above, telephone interviews were conducted with bankruptcy filers. Almost all the US scholars suggested that telephone interviews lasting 60-90 minutes were the most helpful as it gives the interviewer and the participant a chance to fully canvass issues.

In Canada, the most comprehensive data is located with the OSB, both in its regional offices in respect of paper filings and through its national e-filing data system. Here again, there are mandatory filing requirements that ensure a baseline of data and particular types of information, such as assets and debts are accurate, at least by the end of the process. For the most part, Canadian scholars have relied on OSB statistics for raw and summary data on consumer insolvencies and bankruptcies. Some of the OSB generated charts have been included in various publications by Canadian scholars, such as comparative data on surplus income, or trends in numbers of insolvent consumer debtors over different periods. One scholar had reviewed a large statistical sample of individual consumer bankruptcy files from OSB files at its regional offices, from which information was compiled and analyzed using programs developed in conjunction with Statistics Canada in 1977 to 1981, at a time when no other data sources were available. This same study coordinated telephone surveys of credit granting groups and credit counsellors and self-named consumer help groups.

All Canadian scholars surveyed observed that public policy debates would benefit materially from more empirical research in respect of consumer insolvency in Canada. Most scholars reported that they have not had sufficient funding to conduct extensive empirical research. Most scholars observed that

there are large time lags in getting OSB data after they are requested, often acquiring the data too late for the particular study or getting data in a different form than requested or discussed with OSB staff such that it cannot be used effectively. A number of scholars suggested that more resources should be dedicated to processing the information and making it more accessible for scholarly research. One scholar suggested that the OSB could benefit from examining other e-filing systems in order to enhance access to data in Canada.

Canadian scholars believe it is important to access insolvent debtors directly, through written surveys or telephone interviews as an important data source. Here again, funding in Canada has been very limited to allow for such projects. Several scholars thought that the OSB should sponsor longitudinal studies similar to the CBP, with a methodology that includes filing data, surveys and interviews. One Canadian scholar observed that her research assistants collected data from credit counselling agency clients and such a methodology should be further developed.

Australian scholars made similar observations. There is a strong interest in empirical research, but insufficient funding to undertake it in any comprehensive manner. As part of one university funded research project, the Insolvency Trustee Service Australia provided access to debtors' statements of affairs, which are completed as part of the process to enter a debt agreement. However, for privacy reasons, the material did not include personal identifying information. Scholars have not generally undertaken surveys and interviews with debtors because of serious resource and time constraints.

In the UK and continental Europe, scholars report that they have generally used a combination of quantitative and qualitative methods to establish profiling characteristics, such as age, gender, size of debt, home ownership and changes in such variables over time, and qualitative interviews to investigate lived experiences of debt. Where possible and subject to the limitations on time and funding, mixed methods are viewed as optimal, with choice to a large extent dependent on the research questions. The main challenge in the UK is access to any information beyond the very basic data available on the statutory personal insolvency register for current bankruptcies and individual voluntary arrangements. For example, to acquire data about assets and liabilities, researchers need access to bankruptcy files held by the official receiver or individual voluntary arrangement files held by the relevant court and/or insolvency practitioner. Access to the files of insolvency professionals is difficult as insolvency professionals may not be inclined to co-operate and there are data protection issues to consider. Choice of research methodology depends on the research question and wider methodological and philosophical orientation. For example, one scholar observed that if a scholar is approaching issues of consumer debt and bankruptcy from a grounded theory perspective, she or he will prefer in-person face-to-face interviews.

Some scholars report that they have not undertaken direct survey of debtors as the expected return rate would be very low for the time and resources expended, and may represent selection bias. Their view was that debtors in financial trouble may have difficulty in providing a reliable overview or detailed data on their debts. Others worried about the potential stress for participants.

In terms of methodologies that scholars have considered using, but have not to date, the single most frequently cited challenge across all jurisdictions was the difficulty in gathering data on low income consumer debtors who may be financially distressed but have not filed insolvency or bankruptcy proceedings.

Reported methodologies either considered or tried with varying degrees of success were approaching credit counselling clients, renters in housing projects, and minority homeowners in specified communities. The use of “snowball samples”, as discussed in Littwin's study above, may be one effective way to access consumer debtors in particular socio-economic classes, who may live within a particular community or housing project. One Canadian scholar has considered focus groups from Debtors Anonymous, but observed that most of these groups are not keen on research and have confidentiality concerns.²⁰²

Trustee client surveys have also been considered, although there is the problem of confidentiality, ethics approval, and challenges with randomized selection of their clients, where trustees may offer only particular kinds of clients. A number of scholars have not gathered such data because it is time consuming and expensive. One Canadian economist observed that the cost relative to expected return does not make such studies feasible.

US scholars have considered undertaking court record variable extraction from state law debt collection lawsuits, particularly those suits filed by medical providers; however, it was not pursued because it required greater expertise and resources than available. It was felt that the files would be hard to identify, and the information would be very under inclusive. Scholars have also considered increased interviewing of professionals, including judges and bankruptcy attorneys, in a systematic way, but have been uncertain as to whether this information would offer new insights. An important observation by US scholars was that attorneys as informants can be problematic, as they tend not to remember average cases; rather, they tend to remember exceptional cases, which can skew research results.

UK scholars would like to make greater use of official receiver and other government staff to enhance consumer debtor empirical research, but the staff are over-worked such that they cannot support scholarly research in this manner. In Finland, there is overall too little research on over-indebtedness, and scholars observe that the situation and coping strategies of debtors in garnishment is relatively unknown, as is those debtors coping with too big housing loans, both quantitative data and qualitative data are needed.

One scholar observed that the best methodology is a combination of basic information on a wide range of quantifiable variables that will permit analysis of profile characteristics and how those change over time, such as different age/gender demographic among bankrupts when compared to individual voluntary arrangements; whether individual voluntary arrangements tend to attract debtors with higher average incomes and certain patterns of property ownership compared to bankrupts; and richer data derived from interviews with debtors, insolvency professionals and other stakeholders. He observed that if the research question is the impact of legislation designed to improve returns to creditors, then the researcher needs benchmark data from a sample of

²⁰² Debtors Anonymous describes itself as “a fellowship of men and women who share their experience, strength and hope with each other that they may solve their common problem and help others to recover from compulsive debting” It is premised on the notion that the act of acquiring debt is the threshold of a disease, and offers a 12 step program based on AA; with over 500 DA groups in the US, and numerous groups in every province in Canada. Debtors Anonymous, <http://www.debtorsanonymous.org/>. Debtors Anonymous Canada, <http://www.debtorsanonymous.ca/wp/>. Debtors Anonymous started in 1968, first called "Penny Pinchers" and later "Capital Builders".

cases before the legislative change and information about estate outcomes since the legislative change. If it is lived experiences of debtors, then the best data is interview and/or focus group data.

The use of credit bureau data has also been considered and rejected by several scholars. They have concluded that the information is proprietary, which creates access problems; but also that it contains a high degree of error. What it would offer, if accessible and accurate, would be a control sample for undertaking comparative research with bankruptcy filers.

Given that one of the greatest problems currently is identifying financially troubled households that have not opted into bankruptcy or consumer credit counselling, several scholars observed that one solution would be to encourage other surveys of the general population to incorporate more questions to help ensure control groups are available. There needs to be more resources dedicated to finding debtors that have not entered formal systems. There has been little data collection and analysis of consumer debtors that have not yet or ever accessed procedures under the *BIA* or similar country specific insolvency legislation. One possible source of information may be alternative financing organizations, such as pay day loan companies; however, there may be some uncertainty in respect of their willingness to cooperate. Several survey participants suggested that church and community group and other places that provide support might be a possible source for accessing debtors experiencing financial distress.

There are ethical and practical issues in identifying debtors outside of formal proceedings, particularly as they may be left vulnerable to creditor action if they participate in studies. There is also the risk of causing more stress to them at a time when they are already experiencing distress and may not yet have found a remedy. There are also selection bias problems in terms of an inability to know whether or not a cohort of such debtors constitutes a representative sample. Several Canadian scholars suggested perhaps setting up a pilot debt advice clinic to offer free non-legal advice on consumer debt and then asking participants if their information could be used for research. Others felt that there may be ethical considerations in such an approach and that scholars would do better to lobby for publicly funded clinics similar to those in the UK, with a mandatory research component as the *quid pro quo* for the free advice.

Credit counselling services could be helpful in accessing more information on such debtors, although in Canada, they have only infrequently been used. One scholar, conducting one of the earliest studies, worried about objective and sample bias generated by this source of data. Another scholar pointed out that it would be helpful to conduct longitudinal studies in respect of the outcome of households who meet with credit counsellors, in order to measure the effect of choice of resolution to the financial distress. Insolvency professionals observed that accessing information that credit counselling and similar programs deal with could yield a considerable amount of information, but also that trustees have a wealth of information and there should be some means to access this data, even if on an unidentified basis.

Trustees also observed that orderly payment of debt departments would have data that could help, as would collection agencies. Other suggestions made were access to pending files from trustees who have been contacted from debtors who have financial problems, but may not have formally opened the file or began working on the file; total credit recovery programs from credit card companies; credit bureaus; and consumer associations. All survey respondents

were sensitive to the need to address the ethical problems associated with accessing consumer debtors where they are not under the stay protection of insolvency or bankruptcy proceedings.

One possibility is to canvass debtors regarding what information they may have considered relevant to their situation, which was not captured in mandatory filing forms. US scholars report that some of the best questions in the CBR have come from debtors themselves, and been incorporated into interview questions.

Scholars in all jurisdictions discussed the general problem of access to debtors, when they are highly mobile at times of financial distress. Insolvency and bankruptcy records are quickly out of date and it is difficult to track debtors and thus document their experience with the system.

2. *Data Collected by Public Authorities*

The US scholars surveyed disagreed somewhat on whether court records are sufficiently detailed to offer meaningful data. Some thought records are adequate. A number observed that there are many parts of the US forms that are left blank or incomplete or are obviously wrong because no one checks and requires that they be accurate. For example, the date that debts were incurred, annual income, and prior addresses. Another scholar suggested that highest education level attained would be helpful information. One scholar observed that credit bureaus know a great deal more demographically than the court, as the US court does not collect age, gender, marital status, race or ethnicity, and completed education. Occupation is collected, but the responses are often too general to offer meaningful insights.

Scholars observed that categories of debt cannot be accurately identified on court records in the US because they are often subsumed under credit card debt. One scholar noted that there have been occasions where he wanted historical bankruptcy filing data on the numbers of persons filing bankruptcy in particular places on a more finely grained temporal basis, such as monthly or quarterly data instead of annual data, or geographic regions, such as counties rather than judicial districts or states, but such data were not available.

In Canada, a number of scholars observed that the OSB could encourage trustees to do a better job of collecting data on Form 79 and other mandatory filings, which would be helpful to researchers and improve the accuracy and quality of data. Trustees responded that they may be more amenable to including more detailed information if they were persuaded of the value of collecting and reporting the data for research or statistical purposes. In this, there appeared to be a gap between the perceptions of some scholars, trustees and counsellors in respect of the value and intensity of data that should be collected. Most survey respondents suggested that there needs to be considerably more communication between the OSB, scholars and practitioners in respect of information sought on filing forms, guidance to completing forms, and enhanced design format. Survey participants suggested that greater standardization and more nuanced sub-categories for occupation and causes of insolvency would be useful, rather than how data is collected now. Scholars report that there is a lot of missing information on forms now, such as age of filers.

One scholar observed that there should be more precise data collected on the amount and type of assets that consumer debtors are allowed to retain under the exemptions. Numerous scholars observed that there is not particularly helpful reporting on small business debt and its role in personal bankruptcy. Several suggested better data on pay day loans and other new forms of financing; such data is now masked in a number of categories in the OSB's database and difficult to analyze for trends. Another suggestion was to ask bankrupts to provide income data for the period three years prior to bankruptcy, although there may be a problem with records existing or unwillingness to provide such information. Also, system does not itself flag or link up repeat filings, although court documents themselves now sometimes do. Several scholars expressed concern about the reliability of data and the capacity of filers and government staff to appropriately key data in particular fields into the OSB database.

The system also does not capture the linkages between the consumers' insolvency due to loss of employment and the bankruptcy of companies that have been their employers, meaning that real trend in filing and the ripple effects of business insolvency on individual families is not captured. A number of people suggested that the OSB could require this information.

Several scholars observed a disconnection between OSB data collection and work undertaken by Statistics Canada in its census and other data gathering. There could be greater coordination of the government entities, including ensuring that particular debt related questions were placed on census questionnaires in order to provide a control group for future study.

In terms of insolvency professionals' responses, one quarter of the trustees surveyed observed that there should be more standard form language on the OSB forms, which would set out in more detail the causes of the insolvency, allowing for more opportunity to expand answers and elaborate on individual circumstances. Most credit counselling survey participants agreed. One trustee observed that this method still runs the risk of putting people in "boxes" and another warned that it is possible to standardize too much and make the observations less meaningful. One of these trustees pointed out that because "over-extension of credit" is often selected as the "catch all" phrase, it frequently does not have any significant meaning to explain the actual cause of bankruptcy. Almost one half of trustees and counsellors surveyed believe that a checklist of causes can be helpful, four trustees noting that the OSB's move towards standard form language in e-filing has been helpful and should be developed further. All observed that checklists need to be accompanied by a section that allows the debtor to elaborate on individual circumstances. 12% of trustees reported that the current filing is sufficient.

In terms of collecting more data through mandatory e-filing requirements, 35% of the trustees reported that they do not believe anything needs to be added; one trustee commenting that "it creates more work for the trustee but does not seem to have any practical benefit." More than a third of trustees provided suggestions on information that could be added such as: background checks on individuals filing and their business interests, and more data on how consumer data debt relates to a failed business and loss of income. One trustee suggested that a bankrupt's previous dealings could perhaps encourage a more vigilant participation in the process, having gone through it before. Another suggestion was that credit ratings review should be added to the current filing requirements. One trustee stated that attempting to get additional individual bankruptcy information would probably lead to superficial

reasons and probably would not get at the underlying reasons for the insolvency. 6% of trustees reported that the form is confusing and that the language should be more simplified for lay people to understand it easier.

3. Effective Methods of Gathering Survey and Interview Data

All the scholars except one Canadian scholar and one US scholar reported that direct contact with consumer debtors is extremely informative in consumer bankruptcy research, and that speaking directly with debtors or bankrupts is highly preferable to written surveys. They note that in-depth interviews are the most effective means of gathering direct data. This methodology allows people to expand on reasons for bankruptcy, and to add additional information that they would not feel comfortable with on a form. They observed that such information provides a richer and deeper understanding of consumer insolvency and supplements filing data. The Canadian legal scholar who disagreed had the view that data from forms required to be completed by the bankrupt and trustee under the law are more accurate, that these forms tend to be professionally and accurately prepared, and that telephone and in person surveys tend to have more bias. The US scholar observed that it depends on the research question being asked and the objective of the specific empirical research project; thus, it is impossible to make categorical statements about data collection techniques.

One scholar noted that there is a tradeoff between the potential richness of telephone and in-person interviews that may not be gathered through a written response, but such interviews are very resource intensive. She observed that written questionnaires make it easier to collect larger and more representative samples. Other scholars noted that time can often be a factor in interviews, as debtors are working nights or other odd shifts, or holding down two jobs, and thus flexibility must be built into timing of interviews.

In response to the question of whether, in their experience, in-person or telephone interview data is more effective in collection of research data, the responses were relatively mixed. A number of scholars observed that telephone interviews can be more effective than in-person interviews because it is often difficult for the person to find a quiet space in their place of residence to conduct the interview. In person, there are privacy and secrecy issues, even within the home, with respect to the nature or seriousness of the debt problem. Yet coming to an office can be intimidating, unless it is located in the community. Moreover, to discuss these issues is frequently very emotional, and interviewees are embarrassed when they cry or otherwise are upset in their responses. The telephone offers them a measure of dignity, and they can ask for a moment's break.

Other scholars observed that in-person interviews allow the individual to share credit card statements and other relevant documents with the interviewer, which can provide important details of their credit experience and habits. In-person contact also allows the interviewee to get a better sense of the interviewer, helping to build trust. Telephone interviews can be problematic with cell phone service limitations and mobility of the population.

Two other scholars reported that they have received a similar range of response rates for both methods, and that they can be equally effective, both gathering different information than a written survey. In Canada, scholars involved with interviewing credit counselling client reported that a good

confidentiality protocol and rapport between the interviewer and interviewee alleviates some fears of debtors, whether or not the interviews are in-person or by telephone.

The cost of collecting data is a challenge for researchers, but many recommended that greater resources be directed towards allowing interviews as a significant research methodology. Numerous US scholars observed that willingness to pay 50 USD to participate in a lengthy interview made a tremendous difference in the response rate and the quality of data; and at the same time, it helped the debtors a little financially. Many scholars thought their jurisdiction should consider providing research funding that allows researchers to adopt the CBP model of compensating survey respondents and interviewees. Scholars pointed to problems with accessing debtors if there is any time delay after filing, as debtors tend to relocate and are harder to find for both initial and follow up interviews. Compensation and promise of further compensation for follow up interviews assists in debtors' advising researchers when they have moved.

Many scholars observed that the interview process serves another important function in that no one wants to hear the bankrupt's story during official proceedings, and so, in the course of the interviews, many people just want to tell how it happened and explain how external circumstances were often beyond their control. The experience of other scholars in the US, Canada, Europe and Australia was that individual debtors are often happy to discuss their story as the system does not easily accommodate people being able to tell the full story of all the factors that led to their insolvency. In such cases, the interview can serve a cathartic purpose. A Canadian scholar observed that in-person is best but difficult for both reasons of accessibility and because the subject matter is difficult for the interviewee.

Several scholars observed that on-line surveys have been underdeveloped in this field of research and would be worth exploring. Several US projects have had considerable success with placing surveys on a website, using different on-line survey tools that have been developed. They found that they sometimes had a higher response rate than mailed surveys.

Interviews can also identify numerous issues that are not picked up on a survey. US scholars, for example, have acquired data on the length of time debtors have struggled with their bills prior to trying to access the bankruptcy system. They have collected data on the toll on family relationships from financial distress, noting that women are often left alone to manage the financial crisis. The data collected can reveal the impact on children's education of the family's financial distress, and on short to medium term effect on access to decent housing for debtors. It can reveal the psychological and physiological effects of financial distress and harassment by credit collection agencies.

The analysis of data collected from interviews is also very labour intensive, in order to effectively analysed and collate the data collected. US scholars advise that research funding needs to take account of this required time for inputting and analysis.

Several scholars observed that in-person interviews take a huge toll on interviewers as well as interviewees in that the emotional and physiological reactions of the interviewees are so powerful that interviewers can only

undertake several interviews at a time. This reaction by interviewers was also noted in the CBP IV study, discussed in Part III above.

Scholars suggested that the telephone manner and maturity of the interviewers can be pivotal to the willingness of debtors to participate in the interview. The CBP relies on women interviewers, some of who are middle-aged with long experience that is a combination of maturity, empathy and insightfulness.

It is evident that there is considerably less experience in Canada than other jurisdictions with direct interviews by phone or in-person. One European scholar observed that it depends on what the study wants to learn; by phone the scholar can reach more people, but in-depth information is better captured by in-person interviews. Several US scholars observed that it is critical to get buy-in from the debtor bar, as often debtors will ask their lawyer if they should participate. One could make the same observation about trustees in Canada.

Two scholars observed that, in their view, there are not barriers to interviews as a data collection method, as consumer debtors are free to participate or decline to participate in their studies.

More than half of trustees surveyed agreed that in-person interviews are more effective and accurate than phone interviews. They found that often people are nervous and scared; and the rapport and trust developed by a face to face meeting is a necessary prerequisite to acquiring truthful and complete answers. Trustees noted that being able to observe body language allows the trustee to know what questions to probe deeper into. Several trustees observed that a language barrier often exists and that in-person interviews allow for more detailed answers to be achieved through use of body language, writing and speaking. One fifth of insolvency professionals stated that both methods are equally effective, although phone interviews are cheaper and easier. Others believe that phone interviews are more effective, giving debtors a bit of space during the call to consider their answers, resulting in better and more complete responses.

All the credit counsellors that responded to the survey suggested that in-person meetings have better potential to uncover buried causes of financial difficulties such as addictions and gambling; individuals have information with them that they can refer to and face-to-face discussions can be effective. With telephone, it is too easy for a client to be distracted by dogs, children, and call waiting.

Several trustees observed that consumer debtors may be reluctant to speak to researchers because they are perceived related to governmental authorities and they may influence their future access to the system. However, other trustees suggested that if researchers properly introduce themselves and their research objectives, and communicate well, debtors do not generally express fear. Both scholars and trustees observed that the privacy issue is significant. In particular, in Canada and the US, debtors are unaware or have forgotten after being told that some of their information, including their name, is public if they have filed for bankruptcy. Many scholars report the shocked reaction that debtors have that their data in a bankruptcy case is public, as many have not informed their own families and friends. How that initial approach is made to the debtor can be critically important in the response rate and willingness to be candid. Three trustees observed that assurances that the information will not be used against debtors in the future are very important, particular for recent immigrants. Many trustees also noted that it is more the shame or

embarrassment associated with bankruptcy that makes debtors reluctant to talk to them, not their future access to the system.

Several insolvency professionals observed that it may assist to have studies associated with offering resources to consumer debtors that assist them with their financial problems, although ethics considerations would have to be explored, given that debtors may feel they have no choice but to cooperate or they will not be able to get free and accessible debt advice.

4. Age as a Factor in Directly Accessing Consumer Debtors, in Terms of Concern about Vulnerability

Overall, 80% of scholars and 90% of the trustees found that age was not a factor in surveying consumer debtors, and that older debtors should be included in surveys. Others observed that they would be one of several vulnerable populations and ethics approval processes would be sensitive to information sought. Credit counsellors were split in their views that age is a factor in direct interviewing of consumer debtors.

One US scholar responded that he did not know. Recent research has identified Americans over the age of 65 as the fastest growing segment of bankruptcy filers in the US. He observed that the CBP has had many respondents in the older age category, but investigators have no way of knowing if elderly respondents disproportionately declined to answer the survey. Another scholar observed that seniors often live alone and may not have access to information that would assist them with their financial difficulties. With the growth in the rate of elderly bankrupts, they are viewed as an important segment of the insolvent population and age alone is not a good enough reason to exclude them from surveys. One trustee observed that there may be a better case for excluding those over 80 years old.

Several trustees commented that older consumer debtors are often more reflective than younger debtors, on the causes for their insolvency, the factors influencing the situation, and what aspects are self-driven and what are beyond their decision or control.

Issues survey participants thought should be looked at first are health, mental health and education levels. One trustee cautioned that while they should not be avoided for surveys, “we may not be able to derive meaningful results out of surveying the elderly because they may never obtain credit again if they can’t change their habits that led them to bankruptcy in the first place”. Several trustees believe that they should be overlooked in surveys because they may be sensitive to their current financial situation and because they could easily be taken advantage of.

The CBP found that people have very different boundaries who they want to know or not about their bankruptcy, and interviewers often found “inter-generational secrets”, in that the elderly did not tell their children or grandchildren, many middle aged or younger debtors did not want their parents or siblings to know. Thus, sensitivity in speaking about their financial distress was less age-based and more relational.

One credit counsellor observed that there are social challenges in soliciting information from those suffering with mental illness, and the elderly are at risk in this respect. Another observed that what he called the “silent generation

consumers”, those now in their mid sixty’s and older, are more likely to be apprehensive about sharing information or may see themselves as vulnerable. However, he also noted that if the consumers in question are reasonably well educated, academically or self taught, they would likely fully participate in any research project that is reasonable in duration, where the objectives are clearly explained.

5. *Linguistic and Literacy Barriers*

When asked about challenges in collecting consumer debtor data where the respondents’ first language is not the official language of the country and linguistic challenges in survey and interview data collection, the responses varied widely. For trustees and credit counsellors, the majority responded that English was a barrier in less than 10% of cases, whereas another quarter thought it was an issue in 11% to 25% of cases. The majority of responses that language was not a barrier came from professionals with a rural or small city practice, all outside of Québec. Those that answered that it was an issue or concern more than 50% of the time tended to work in large urban centres, Toronto, Mississauga, Montréal, and Vancouver, and their satellite communities. The US scholars have found that offering a Spanish language option enhanced the participation rate of the survey, particularly in some states.

In terms of potential literacy challenges in responding to questionnaires, assuming surveys are at a grade 12 level of English or French, one third of trustees and credit counsellors reported that between 0-10% of their clients would face literacy challenges in terms of responding to a survey questionnaire. Another one third reported that up to one quarter of their clients would face challenges in responding to questionnaires at a grade 12 reading level. 20% reported that greater than 50% would have problems. These responses did not appear to be geographically significant in terms of delineating a particular region, or an urban or rural distinction. For all responding credit counsellors save one, literacy or language was a barrier in less than 10% of all their cases.

The scholar responses differed in their view of whether there were linguistic or literacy barriers to participation. Most answered that they did not know, even where they had engaged in extensive survey and interview data collection, because those debtors may have self-selected not to participate. Several scholars observed that the issue is less literacy and more “legal literacy” in the sense that consumer debtors have trouble with legal terms such as “collateral” or “security interest” and that it is important to offer definitions and synonyms to assist in complete responses. It is also important to create space for respondents to ask questions about ambiguities in the questions or to clarify responses in terms of understanding what the debtor is trying to communicate about their experience. She observed that a good measure of literacy is to ask an open-ended question in the survey, such as why the individual faced bankruptcy. Free-form answers tend to attest to a relatively high level of literacy and ability to articulate the underlying causes of the insolvency. Scholars have been able to draw on rich detail in such answers, which really reflect the enormous complexity underlying the decision to file.

The most frequently cited barrier by scholars to direct data collection from consumer debtors was by far the social stigma, shame and embarrassment that consumer debtors feel when they are in financial distress. In their

experience, this stigma was a greater factor than language or literacy. Another factor is a suspicion of authority, and concern about what government or creditors might do if there are complaints about the system or their experience. There is considerable concern about confidentiality, and such assurances can be difficult to communicate where the debtor's first language is not one of the official languages of the country.

The experience of scholars is that fear of reprisals from creditors or government was also a larger factor in debtors' willingness to participate in studies than issues of literacy or language. Several observed that debtors are sometimes suspicious that the information will end up in the hands of debt collectors. Often by the time debtors access the system, they are already being pursued and sometimes harassed by collection agencies. There is fear that information will be used against them by a creditor; and although researchers have done much to reassure debtors of the good faith nature of the study, these debtors have already been harassed by bill collectors and may be reluctant to speak with investigators. It takes considerable reassuring and undertakings before debtors are confident in the confidentiality of the data.

6. More Effective Use of Insolvency Professionals in Data Collection

There was generally very strong support for increased collaboration between scholars and insolvency professionals. Legal scholars suggested that insolvency professionals could be very helpful in drafting questions and persuading debtors that it is safe to talk with scholars.

One scholar observed that a culture of the usefulness and value of research needs to be cultivated and scholars need to persuade trustees of the "value added" component of research and how it could improve their service or competitiveness. Several scholars reported that the trustee community is not cooperative and somewhat suspicious of research, while others have found a very high degree of cooperation.

Trustee records were seen as useful, but both privacy issues and professional ethics standards would have to be respected. With modern technology, compiling more extensive profiles of consumer debtors could be more effective and accurate than doing periodic surveys. Many survey respondents suggested that the OSB should work with research groups every few years in determining improvement to required information in the forms. In order for an increased amount of data to be useful for research, the questions asked and the recording of data has to be consistent across all types of filing in the system. Trustees have an important role to play in this respect.

In the US, the private bankruptcy trustees and attorneys have databases full of data; however, they do not have to release these records even in de-identified form. It would be extremely helpful if researchers were allowed access to these records as data could be captured and utilized more than it is. Scholars observe that many Chapter 13 fail, but there is little data on at what point and why.

A number of respondents noted that insolvency professionals can be very helpful in participating in interviews; identifying possible survey participants for research projects, assuming ethics considerations are met; and in keeping records on particular issues or trends from time to time as identified by the OSB.

Australian scholars observed that it would help if insolvency professionals would support research grant applications by universities, both in-kind funding support and provide information to enable contact with debtors, as far as they are able, given privacy laws. Others felt professionals could be helpful in the design of questions on surveys. Two scholars observed that it would be helpful if such professionals would themselves participate in interviews and surveys.

One scholar suggested interviews with debt counsellors, in order to better understand the nature of debt problems and current changes. Debt counsellors have clients that may be at an earlier stage of financial distress, and it would be helpful to better understand the nature of the advice given and track outcomes.

One half of Canadian trustees surveyed agreed that participating in survey interviews is the best way to better utilize insolvency professionals in the collection of research data. Although one points out that such participation is only beneficial afterwards, after basic data is collected, the trustees can serve as an oversight review. However, the concern is that trustees may exhibit natural bias. One half also agreed that close collaboration with researchers is important and they should aid in drafting survey questions, although one person pointed out that trustees may be too busy to do so. A number of trustees observed that data interpretation should also be done with the help of an insolvency professional. The trustee and credit counselling community should be included in the collection of research, where such professionals are interested and willing.

The majority of trustees agree that keeping records on issues and tracking trends as identified by the OSB is beneficial. They could be helpful in identifying possible survey participants, although one trustee cautioned against as there would be too much selection bias by trustees and they would probably pick out memorable debtors or debtors they liked, skewing the results. Three trustees commented that data sharing among professionals needs to be made easier; one suggests the creation of a database to better track data and the need for more collaboration amongst the trustee community.

14% of the trustees wrote that they did not want greater trustee involvement in research, because "trustees are busy enough"; that they run a business and should be compensated for such work. One trustee observed that trustees would have more time to do this sort of work if the OSB weren't so aggressive in its oversight without giving them room to be objective and practical when dealing with debtors. Trustees observed that there would be better cooperation if trustees knew what the purpose of the data collection is. If trustees knew what being asked to produce, they could ask it on the estate information forms they need to submit for filing the estate. Any front-end information needs to be clear, accessible and streamlined, so that there is not undue cost to the administration of the file.

Another suggestion was the possibility that consumer lenders would give access to data, which has happened on occasion, but survey participants noted that such access is generally only for industry-favoured researchers.

In England and Wales, there is a lot of the information on over-indebtedness, but much of it is private hands: banks, credit bureaus, debt advice charities, and private sector debt management companies. Scholars observed that the key is to partner up with these organizations; but, even then, there are

concerns about data sharing and data protection. Scholars report that it is currently very difficult to conclude anything beyond the impressionistic when it comes to debtors who are outside the formal bankruptcy system.

Responding credit counsellors observed that they are already extremely limited in their time and resources to complete data requirements. Several observed that scholars that wish to collect empirical data should start with Credit Canada, as the agencies that their administration runs through Credit Canada would have the option to collect this information on intake. On intake, perhaps a client could be offered the opportunity to visit a website where confidentiality is assured and complete some key questions as openly and honestly as possible. One counsellor expressed willingness to cooperate with the OSB from time to time to document particular trends. One respondent observed that if the credit counselling agencies were to receive more resources, they would be better positioned to assist in data collection.

In terms of identifying possible survey participants for research projects, several credit counsellors thought that task this may be problematic because of confidentiality considerations, and the fact that clients are constantly assured of privacy when they first consult.

Counsellors' experience is that debtor clients or potential clients are generally unwilling to enter into discussions where personal finances are the center of attention, posing considerable challenge for their work and likely even larger challenges for scholars accessing these debtors. One counsellor noted that in the past, they have found it impossible to find a client willing to talk to the media, even when the interview will be conducted by telephone, they will not be identified beyond first name to the interviewer, and that their voices will be mimicked in the final product. There are also ethical considerations, in terms of both privacy and setting clients' minds at ease in respect of the confidential nature of the advice given. In turn, these restrictions may limit scholarly access to these debtors, as unlike bankruptcy, debt counselling is not a public process and mandatory stays are not in place to protect against creditor pressure. Counsellors expressed a willingness to participate in survey interviews and offer advice on drafting of questions.

7. Documenting Recent Legislative Reform

A number of survey respondents made suggestions in respect of how to measure the effect of legislative reform. There are two types of studies. The first is where there is a working hypothesis, and then depending on that hypothesis, particular questions need to be formulated to measure its validity. The other type of study is a broad based gathering of data, such as the CBP, which collects detailed information on a longitudinal basis and then allows researchers to develop hypotheses and test the data. The collection and reporting of the data must then measure factors considered important, such as debt levels, current income and projected income, and family expenses. Scholars noted that there is a need to have comparable datasets before and after legislative change. Also, one may need data to assess broader socio-economic trends.

On specific topics that scholars would like to see researched, one suggestion was to incorporate questions on consumer bankruptcy and debt into panel surveys of households. The one problem is that the sample size of bankrupts is likely to be relatively small, but the advantage is that one can track how

bankrupts' income, debt and consumption evolve relative to households who did not experience financial difficulty. One scholar suggested that questions on debt and bankruptcy could be included on surveys such as the Survey of Labour and Income Dynamics (SLID) or Census surveys.

Many scholars and insolvency professionals identified the need to track activities under Canada's new Wage Earner Protection Program (WEPP) to determine whether it is meeting its objectives. Research should include what costs will be incurred to meet unpaid wage claims, how much trustees are actually recovering from the government, the number of wage earners who access the process, and the difference in the amount they receive and what they would have received in a *BIA* proceeding. There should also be analysis of the overall financial impact of the program; how much extra time that trustees and receivers are spending for government compliance programs or rules; and the extent to which the cost is borne by creditors or the general tax base. Trustees want to find out about the administrative expenses associated with setting up the program; are interested in how the program will affect student loans; the costs to the government; and the number of employees who will take advantage of this program and how it will impact them.

A number of trustees want research on the effect that the recent reforms have, including the effect of the WEPP on Registered Retirement Savings Plans (RRSPs); and the utilization of exempt RRSPs.

Another trustee would like research on how the new proposal provisions are being monitored and assessed in terms of outcomes.

One trustee noted that the effect of mandatory conditional discharges for debtors who are obligated to make payments for an additional period should be studied, with good empirical data collected. Study of the effect of these provisions on proposal filings would also be useful.

Trustees and scholars would like analysis of how the new legislation will affect secured creditors' lending practices because they have changed ratios and imposed different covenants to account for the legislative changes.

V. Ethics Considerations and Approval

While surveys and interviews are clearly a beneficial methodology for data collection, there are important issues of ethics in respect of debtors and bankrupts as an arguably vulnerable population. Moreover, debtors may be reticent to speak to persons that are perceived to be governmental authorities that may influence their future access to the system. Confidentiality assurances and ethics approval serve as a mechanism to protect participants.

Ethics approval can, however, present a barrier to empirical research. Several scholars observed that valuable time can be lost when multiple research collaborators require ethics approval from each participating institution. Depending on the caliber of the university of the principal investigator, many US law and business schools will accept the ethics approval of the principal investigator as evidence of the propriety of the research and grant an expedited approval. Canada has no history of such deference in legal research.

In Canada, while for a number of years, ethics approval was fragmented, depending on the discipline and university, there has been a move to coordinate under the 2003 Tri-Council Policy Statement on “*Ethical Conduct for Research Involving Humans*” (TCPS).²⁰³ The TCPS is accompanied by a two hour online tutorial.²⁰⁴ Three federal research agencies created the Interagency Advisory Panel on Research Ethics to develop, interpret and implement the ethics policy. There is currently another consultative process in respect of qualitative research.²⁰⁵ In December 2008, the Panel released its second draft of the TCPS, the culmination of seven years of consultation and collaboration between Canada’s research community and members of the Panel.²⁰⁶ The Panel has proposed a new set of core principles, clarified definitions, simplified articles, and new chapters on qualitative research and research involving Aboriginal peoples.²⁰⁷

²⁰³ The TCPS replaces SSHRC’s *Ethics Guidelines for Research with Human Subjects*, which had previously governed ethics approval in law and related disciplines in Canada. The Tri-Council Policy Statement “*Ethical Conduct for Research Involving Humans*” (TCPS) (2003) describes the policies of the Medical Research Council of Canada (MRC); the Natural Sciences and Engineering Research Council of Canada (NSERC) and the Social Sciences and Humanities Research Council of Canada (SSHRC), the three major research granting agencies in Canada;

http://www.pre.ethics.gc.ca/english/pdf/TCPS%20June2003_E.pdf. Originally the TCPS was released in 1999. Commitment to the ethical conduct of research involving human subjects was first expressed in the publication of guidelines in the 1970s. Joint policy was started after the formation of the Tri-Council Working Group in 1994.

²⁰⁴ TCPS Tutorial found at <http://www.pre.ethics.gc.ca/english/tutorial/welcome.cfm>. The tutorial was launched in April 2004. The Council states in its documents that it will consider funding only to individuals or institutions which “certify compliance with this policy regarding research involving human subjects, at 7.

²⁰⁵ The PRE meets at least twice a year and posts its working committees’ reports that address changes or clarifications to the TCPS; PRE Website

<http://pre.ethics.gc.ca/english/index.cfm> ;

<http://www.pre.ethics.gc.ca/english/publicationsandreports/publicationsandreports.cfm>

²⁰⁶ Panel, May 2008 “Summary of Feedback Regarding the Qualitative Research Document Circulated by SSHWC”;

http://www.pre.ethics.gc.ca/english/workgroups/sshwc/QR_Feedback.cfm;

Panel, May 2008: “Proposed Textual Changes to REB Operational Issues in the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* (TCPS)”;

http://www.pre.ethics.gc.ca/english/workgroups/progroup/REB_Operational_Issues.cfm;

Panel, April 2008 “Ethics Review of Research in Multiple Settings and/or Involving Multiple REBs”;

http://www.pre.ethics.gc.ca/english/workgroups/progroup/Multiple_Settings.cfm;

http://www.pre.ethics.gc.ca/english/pdf/newsandevents/TCPS_Dec_4_en.pdf.

²⁰⁷ The PRE is asking for further involvement from the research community and has planned the TCPS Regional Consultation Tour 2009 which is scheduled to cross Canada from January through March 2009. It is inviting feedback from researchers, research ethics boards and administrators, research participants and the Canadian public;

http://www.pre.ethics.gc.ca/english/pdf/newsandevents/What%27s_New_in_the_TCPS.pdf;

http://pre.ethics.gc.ca/english/newsandevents/newsreleases/Regl_TCPS_Tour_Sched.cfm.

The major universities in Canada have all adopted the TCPS. York University uses the TCPS as its principal reference for ethics review.²⁰⁸ The University-wide Human Participants Review Committee is responsible for the review of all research involving human participants in compliance with the TCPS, the review process taking 20 working days from receipt of the application, with approval lasting for one year.²⁰⁹ The Office of Research Ethics at the University of Toronto, in addition to using TCPS, provides extensive links to domestic and international policies and guidelines to do with research involving human subjects, offers workshops on human subject ethical research, and has a link to guidelines on how to create informed consent documents.²¹⁰ Expedited review can take up to four weeks.

McGill University has also reported that it is committed to adhering to the principles stipulated in the TCPS and all research done involving a human subject at the university must be in compliance with TCPS standards.²¹¹ Its Advisory Council on Human Research Ethics is responsible for coordinating and assuring compliance of ethical requirements of research involving human subjects and it reports directly to the Board of Governors and to the office of the Vice Principal.²¹² There is no published information on timing of approvals.²¹³

Dalhousie University has published its own ethics policy, but the principles are drawn from the TCPS.²¹⁴ Ethics approval takes approximately two weeks.²¹⁵ Dalhousie also provides a consent form checklist to help researchers with their work. At the University of British Columbia (UBC), all research has to be in compliance with UBC *Ethics Directives*, the TCPS, any relevant national and international standards or condition for funding.²¹⁶ All persons connected to the university doing research on human subjects must conform to *University Policy*

²⁰⁸ York University, "Ethics Review Process for Research Involving Human Participants Policy"

<http://www.yorku.ca/secretariat/policies/document.php?document=94>

²⁰⁹

<http://www.yorku.ca/secretariat/senate/committees/scor/reports/030422/ethicsreview.htm>

²¹⁰ <http://www.research.utoronto.ca/ethics/>; http://www.research.utoronto.ca/ethics/eh_policy.html;

http://www.research.utoronto.ca/ethics/eh_education.html;

http://www.research.utoronto.ca/ethics/eh_u_inf.html.

²¹¹ McGill University, "A Guide to Sponsored Research at McGill University" <http://www.mcgill.ca/researchoffice/policies/sponsored/> and "Policy on the Ethical Conduct of Research Involving Human Subjects", <http://www.mcgill.ca/files/researchoffice/McGillHSPolicy.pdf>, at 2.

²¹² *Ibid.* at 4.

²¹³ Ethics approval is valid for 1 year and must be renewed annually 3-4 weeks before last approval expires. Final report must be submitted as well, *ibid.*

²¹⁴ Dalhousie University, "Dalhousie University Policy on the Ethical Conduct of Research Involving Humans"; http://researchservices.dal.ca/files/DALHOUSIE_UNIVERSITYPOLICY_ON_ETHICS_REVIEW_OF_HUMAN_SUBJECT_-_April_2008.pdf.

²¹⁵ The University has two Research Ethics Boards which review all faculty and graduate research that involves human participants, tissue or data: The Health Sciences Research Ethics Board and the Social Sciences and Humanities Research Ethics Board; http://researchservices.dal.ca/research_1482.html.

²¹⁶ <http://www.ors.ubc.ca/ethics/humansub/policy.htm>.

*#89 Research and other studies involving human subjects.*²¹⁷ All graduate students involved in human subject research are required to complete the TCPS tutorial before an application is submitted to the Behavioral Research Ethics Board.²¹⁸ The university uses Researcher Information Services (RISe), which is a secure online system for UBC researchers, students and administrative staff to submit and renew human ethics applications.²¹⁹ There has been a problem in the past with long delays in approval, but the timing appears to have improved in the past year. UBC does not publish information on the timing of approval.

The University of Alberta's Research Ethics Office has oversight of ethics and approves all human subject research.²²⁰ Research funding is withheld until the appropriate approvals are granted.²²¹ The university uses the Human Ethics Research Online (HERO) system to automate the review process for human subject research through an online application form. HERO also provides links to the TCPS and the tutorial, as well as domestic and international ethics policies and boards.²²²

The current assessment of qualitative research has observed that a number of factors must be incorporated into ethics review, including, the approach to informed consent and the diversity of ethical relationships in the social sciences and humanities between researchers and participants; the variety of contexts in which issues of anonymity and confidentiality; clarity regarding the conditions under which ethics board adjudicate scholarly merit of research proposals; recognition of the ongoing, program-based research that is often the norm among researchers in the social sciences and humanities; the need for standardized guidelines for supervised, skill-appropriate research opportunities for students across the country; the complexities that arise from international, inter-societal and intercultural research; and the near-absence of documentation regarding creative and performance-based research.²²³

Ethics review reform in Canada has not been uncontested. One scholar has argued that "overzealous research ethics boards and university legal departments are undermining survey-based research".²²⁴ Where studies are

²¹⁷ <http://www.universitycounsel.ubc.ca/policies/policy89.pdf>.

²¹⁸ The university has six different REB's, whose committees meet regularly. *Ibid*.

²¹⁹ <http://rise.ubc.ca/rise>.

²²⁰ University of Alberta: <http://www.uofaweb.ualberta.ca/orca/index.cfm>; ensure that the Tri-Council Memorandum of Understanding requirements for research involving human subjects and animals are in place for all phases of research activity.

²²¹ <http://www.uofaweb.ualberta.ca/orca/index.cfm>.

²²² <https://hero.ualberta.ca/HERO/Rooms/DisplayPages/LayoutInitial?Container=com.webbridge.entity.Entity%5B0ID%5BAC482809EC03C442A46F2C8EEC4D75D3%5D%5D>.

²²³ May 2008 "Summary of Feedback Regarding the Qualitative Research Document Circulated by SSHWC";

http://www.pre.ethics.gc.ca/english/workgroups/sshwc/QR_Feedback.cfm.

-May 2008: "Proposed Textual Changes to REB Operational Issues in the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* (TCPS)".

²²⁴ Leo Charbonneau, "Ethics boards harming survey research, says York professor" June 6, 2005, *University Affairs*, discussing Dr. Paul Grayson's (York University) attitude towards REBs; <http://www.universityaffairs.ca/ethics-boards-harming-survey-research-says-york-professor.aspx>. See also "Qualitative Research in the Context of the TCPS: A Follow-up to the *Giving Voice to the Spectrum* Report and a Discussion

conducted across different universities, ethics boards still accord little or no deference to ethics approval by other universities, meaning that the same survey methodology can be accepted in some, accepted with minor or major required amendments to others, and rejected, creating either data inconsistencies as different data ends up being collected, or incredible time and expense to seek amended approval with all the modifications required by various ethics boards.

US scholars report many of the same problems. There is a huge amount of time spent on ethics approvals. The same rigour is applied where research is legal as opposed to medical, yet issues of protection and confidentiality can differ considerably. There is under-representation of humanities scholars on ethics boards, creating problems with the expertise and understanding of reviewers. In respect of bankruptcy, much of the information is already on the public record, but medical scholars considering such applications often do not appreciate this fact, creating barriers to approval. In the US, some universities will recognize the ethics approval of another University; in other cases, note is taken but the process is *de novo*.

VI. Conclusion and Future Research Considerations

This paper has canvassed methodologies for empirical research on consumer debtors, exploring the benefits, limitations, barriers to, and potential for enhancing such research. Both previous studies and the surveys of scholars, trustees and credit counsellors reveal that there continues to be a disconnection between the debt that consumer debtors are incurring, lending decisions in respect of that debt, and public policies aimed at fresh start. In Canada, there is little research measuring change in the demographic profile of debtors and larger economic trends. There is little that tracks how changes to insolvency and other social policy and the availability of resources through social safety nets have affected consumer indebtedness. T

Funding should be made available for two types of research. First, there is a need for broad based gathering of data that collects detailed information on a longitudinal basis and then allows researchers to develop hypotheses and test the data. Second, there is a need for more focused research, where there is a working hypothesis and research questions and methodology formulated to measure its validity. The following are some recommendations regarding future research, including both quantitative and qualitative empirical research.

1. The Need for Broad-Based Longitudinal Empirical Research

Consumer insolvency policy development has benefited from the input of trustees and debtors' counsel in terms of particular barriers that may diminish consumer debtors' access to the rescue or fresh start provisions in the *BIA*. However, consumer debtors themselves, arguably the most important constituency, have had virtually no direct input into policy making, largely because they are not repeat players in the system. At the point at which they access the system they are already under considerable distress financially and

emotionally. Afterwards, they are likely too exhausted to consider how to access and influence future policy choices. The information gathered for purposes of this paper makes clear that there continues to be a lack of empirical data that would provide the basis for informed and cogent public policy development in respect of consumer debtors in Canada. Moreover, there is no systematic effort to collect and analyze data over an extended period of time, such that we can measure the types of debtors accessing the system; alternatives to filing; and outcomes from *BIA* proceedings.

The OSB could convene meetings on an annual basis with scholars and insolvency professionals to discuss current problems or limitations on data collection, allowing participants to identify new fields of information that should be captured or make recommendations to revise existing fields of data to be responsive to economic, cultural and statutory changes.

Canada's policy decisions would be considerably enhanced by the use of broad based multidisciplinary longitudinal studies, commencing immediately and tracking the effects of recent and proposed insolvency law reform. A good start has been made through the OSB's e-filing and data collection initiative, but to date that information is limited in what it collects, how it can be analysed, and how it informs public policy. Canada can benefit from the extensive experience of US and other scholars, including the considerable thought that has gone into design of research methodology, survey techniques and substantive questions asked. An important feature of such studies is direct contact with consumer debtors, as described in the next recommendation. Such studies would allow for the collaboration of economic, legal, administrative and political science scholars, offering greater insights and better future research design.

More specifically, debt to income ratio has been a helpful explanation in US studies for bankruptcy. Canada would benefit from more analysis of these statistics as a measure of the system's efficacy. This paper also highlights that is important to analyze gender, race, class and age when examining debtors, as these different factors may have a significant impact on reasons for, and solutions to, consumer financial distress.

2. The Value of Interview and Survey Data

The extensive questionnaires and interviews are a critically important feature of research generated by the Consumer Bankruptcy Project in the US and the PIP project in the UK, matching the information gathered in that process with the data in court or administrative files. While the complexity of each debtor's history is unique, the interviews across a large cohort have enabled patterns to be established.

One real strength of the Consumer Bankruptcy Project as it has evolved is not only the ability to compare global data over an increasingly extended time period, but the use of interviews for consumer bankrupts one year and three years after filing for bankruptcy as a measure of outcomes of the bankruptcy process. Consumer debtors have had some important insights into the process, their longer term ability to become or remain solvent, and broader social and economic challenges that they face.

Canada would benefit tremendously from a project that systematically accesses consumer debtors immediately after, then one and three or five years

after the process, in order to better assess how utilizing various procedures under the *BIA* assist in financial rehabilitation over the short to medium term.

All of the US empirical studies offer compensation to survey respondents. The interviews with scholars reveal that this economic incentive is not only a means of encouraging participation in the detailed interviews, but it values debtors' time and provides a degree of respect in that they are compensated for their insights and observations. Such compensation needs to be factored into Canadian funding for such studies, as does the highly labour intensive nature of training interviewers and conducting such research.

A great deal can be adopted from survey and interview methodology from the US Consumer Bankruptcy Project. Creating space within the survey or interview for debtors to tell the stories of their insolvency in their own words can provide a deeper picture, but also identify literacy and language issues. It is important to offer debtors definitions and synonyms to assist in complete responses and to allow respondents to ask questions about ambiguities in the questions or to clarify responses in terms of understanding what the debtor is trying to communicate about their experience. Both close and open ended questions should be used. The high response rate in the CBP has been due to the multi-faceted strategy of data collection. Tests of inter-coder reliability and coding error procedures can assist with a high degree of data quality.

There should also be consideration of utilizing computer based survey and interview technology. The OSB could assist in developing a methodology and the technology that could be used by scholars in a number of disciplines to gather data on insolvent or financially distressed debtors.

3. Deepening Insolvency

Critically connected with the need for longitudinal data is a need to understand how the nature of indebtedness is changing. The most recent Consumer Bankruptcy Project in the US documented how consumer debtors that filed under US bankruptcy proceedings are deeper in debt than previously, with much higher debt to income ratios and greater short term high interest rate debt. As noted above, scholars speculate that credit card and other short term high interest lenders encourage debtors to delay filing, to pay interest charges for a longer period and to increase their indebtedness before they file. Earlier studies in Canada, the US and the UK had found that while credit enforcement measures by creditors before bankruptcy filing was relatively rare, the sale of debts to debt-collecting agencies, the harassment by such agencies, the phone calls to friends and relatives, were a consideration in the timing of filing. Payday loans and other alternative financing systems may be contributing to the deepening of insolvency, but they may also be offering an important means of financing very poor debtors.

We need considerably more understanding of the extent of this phenomenon in Canada. It is particularly timely that research be undertaken in this area, in order to formulate policy responses to the practice of high interest short term debt and the lack of alternative affordable community based financing for the lowest income debtors.

4. Need for Research on Debtors that have not Accessed Proceedings under the BIA

Scholars, practitioners and government need to work together to find ways to access debtors that are experiencing financial strain and have not yet accessed the formal proposal or bankruptcy system. This problem is a large and systemic one. It involves not only credit education, providing free credit advice, but also raises larger social and political issues in respect of social safety nets that protect debtors from income shocks and other disruptions to their income stream. US data suggests that debtors are struggling longer, with more debt, than previously, and deferring filing under insolvency legislation can deepen their indebtedness and make it difficult to have a fresh start.

Research is needed into the degree to which debtors are struggling in this way and what public policies need to be adopted to address the problems. What considerations do lenders use to make lending decisions and does this affect the availability of credit where the debtor has no realistic way of paying off the debt? What factors encouraged or enabled debtors to accrue debt that was beyond their capacity to meet the obligations? There appears to be a distinction between loans for mortgages, leaving aside the sub-prime issue, which occurred primarily in the US, and other secured lending, where there is due diligence by the lender to ascertain if there are assets to cover the value of the loan, and unsecured debt, such as credit card debt.

There should be more systematic consideration of how credit counsellors or trustees could be used to identify debtors that have not yet accessed the system, keeping in mind the problem that debtors do not yet have the benefit of the stay protection before they file. The suggestion by credit counsellors that on intake perhaps a client could be offered the opportunity to visit a website where confidentiality is assured and complete some key questions as openly and honestly as possible should be explored. A number of suggestions in the scholar and insolvency professional survey discussed above deserve careful consideration.

The OSB could also consider broader proactive measures, such as working with the community and other government agencies to set up free debt advice clinics, exploring what has been most effective in the UK or elsewhere. Aside from insolvency issues, it would seem that support at a much earlier stage of financial distress could be helpful. These strategies would have to be multi-faceted and developed with the participation of consumer debtors, insolvency and credit professionals, scholars, legal clinics, and other stakeholders in the community.

5. Research on Preventive Strategies

Research on prevention of over-indebtedness is urgently required, for example on interest rate ceilings, guidelines in respect of mortgage lending, broad based educational strategies, development of financing alternatives that are affordable and accessible, more general social safety nets, and long term economic sustainability strategies. Some preventive measures are likely to be highly contested, such as controls on credit granting. Absent solid data and research into comparative strategies, Canada will be unable to devise meaningful and practical strategies to address consumer insolvency.

6. *Connecting Research and Policy Making*

There is a disconnection between research that has occurred and policy making. In undertaking this study, we were struck by some of the cogent recommendations for reform that were made over the past decade, but which did not enter the public policy debates during this round of legislative reform. The OSB could play an important role in creating an ongoing public policy committee that would examine recommendations from each research study, and where appropriate, develop strategies to begin to meet those recommendations. There could be representation from a broad set of interests in those policy discussions.

7. *Ethics Approval*

There should be policy guidelines promulgated by the OSB in respect of conducting research that directly accesses insolvent consumer debtors, building on university ethics guidelines, and respecting the privacy and dignity of consumer debtors while allowing accurate collection of data.

The OSB could play an educative role with university ethics boards in Canada, highlighting the nature of consumer insolvency, the trustee driven system, and the ethical issues faced in accessing such debtors. It could also play a facilitative role in encouraging boards to defer to the ethics approval of other universities where there are multiple collaborators.

8. *Conclusion*

There is much to be learned from empirical research. It can draw on the insights of multiple participants in the system and better inform policy choices. Different kinds of research may meet different policy needs. Broad based multidisciplinary longitudinal research allows for collection of detailed information on a longitudinal basis, which can be used by many scholars and policy makers to develop hypotheses, test the data and make sound policy choices. More focused research, which develops a methodology based on clear research questions, can provide meaningful data on focused topics. Research questions should be clearly identified, so that the methodology selected is appropriate, recognizing also its limitations. Both kinds of research are highly informative and very much needed in the consumer insolvency area. This paper offers a number of insights into how we can enhance our current research and policy process through collaboration between the OSB, the insolvency and credit profession, and social science researchers. The result will be a better informed policy making process, provided with the tools to assess both needed reforms and the effectiveness of past initiatives.

Appendix I

The scholars, trustees and credit counsellors surveyed were asked whether there are any other issues that they think should be a priority in respect of future research regarding consumer insolvency in Canada. Where their suggestions were not included in the text of this paper, they are listed here:

- The relationship between the state and debtors. More research should be undertaken in respect of Revenue Canada and how it affects choice by sole proprietorships to file bankruptcy or proposal, and the extent to which it deters viable workouts. Such research would be significant, but would require the cooperation of CRA, which may have little incentive to assist.
- Related to this suggestion was a call for research in respect of the attitude of the government as creditor at all levels, in that it can be very aggressive when seeking to recover what is owed.
- Research regarding creditor involvement in consumer insolvency.
- Research regarding the way that debtors are treated by credit ranking associations and how it affects choice of proceedings.
- Research on uses of the levy charged by the OSB is being used and whether this use is effective.
- More research on consumer insolvency by region and linkage of consumer debt to economic health of regions.
- Research into the effects of the credit counselling programs and whether they are appropriately targeting underlying causes of insolvency.
- Research on the early indicators of distressed sole proprietorships.
- Research fraud, lack of due diligence of lenders, and government-guaranteed small business loans and default rates.
- More research on pay day loans and other alternative financing organizations.
- Investigate the reported causes of insolvency; some trustees suggest that the real reasons, such as greed, incompetence, individual error, are sometimes not reported, and thus can raise an issue of the accuracy of the data reported.
- Research on the impact of garnishment, excessive mortgage and personal third party guarantees that people give for loans that their family members on insolvency rates

All of these topics are under-researched in Canada, and would assist in future public policy development.

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Appendix III

Survey

Accessing Insolvent Consumer Debtors, Challenges for Empirical Research

Researcher: Dr. Janis Sarra, UBC Faculty of Law, sarra@law.ubc.ca

Research Assistants: Danielle Sarra and Bernard Lau

Introduction

This research project is funded by the Office of the Superintendent of Bankruptcy (OSB), Industry Canada, Government of Canada. The objective is to examine the best options for researchers to access insolvent consumer debtors that have utilized the procedures under domestic bankruptcy and insolvency legislation and those consumer debtors that have not yet accessed the system, to enhance data collection. This survey is to gather information and facts from scholars and Canadian trustees; and it is confidential. Only summary results will be reported to the OSB. Scholars in several jurisdictions are being asked to participate.

Questions

1. What methodologies have you used for collecting data on consumer debtors? Why?
2. What methodologies have you considered using, but not used, and why not?
3. Are there fields of information currently collected by public authorities that are missing or improperly captured? For example, in Canada, information on individual bankruptcy following a company bankruptcy. This missing data could comprise either data that regulators seek to capture, but which is not being filled in, or data that regulators are not trying to capture with current forms.
4. What based on your experience is more effective; in-person or telephone surveys of consumer debtors in collection of research data?
5. How can trustees, receivers and other insolvency professionals be utilized more effectively in the collection of research data? For example: Identifying possible survey participants for research projects, meeting ethics requirements; keeping records on particular issues or trends from time to time; working with researchers to draft survey questions; other, please specify.
6. Is age a factor in directly accessing consumer debtors, in terms of concern about vulnerability?
Is this answer based on your research experience ____ or the experience of your jurisdiction in gathering data ____ or both ____?
7. What percentage of consumer debtors, whose first language is not the official language of your country, face linguistic challenges in terms of responding to questionnaires, assuming such survey is at a grade 12 level? 0-10% _ 11%-25% _ 25%-50% _ 50%- 75% _ Over 75% ____
Is this answer based on your research experience ____ or the experience of your jurisdiction in gathering data ____ or both ____?
8. What percentage of consumer debtors face literacy challenges in terms of responding to questionnaires, assuming such survey is at a grade 12 level of the official language of your country? 0-10% _ 11%-25% _ 25%-50% _ 50%- 75% _ Over 75% ____
Is this answer based on your research experience ____ or the experience of your jurisdiction in gathering data ____ or both ____?
9. Are there any other barriers to consumer debtors participating in surveys and data collection projects?
10. Based on your experience, what other information collection methods can be used on insolvent individuals that have not yet accessed the procedures under insolvency and bankruptcy legislation? (such as credit counsellors).
11. Based on your experience, are consumer debtors reluctant to speak to researchers because they are perceived related to governmental authorities that may influence their future access to the system?
12. What data is most helpful to you, in order to assess the most recent legislative reforms in your jurisdiction?